Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1996

FERRIS J. ALEXANDER, SR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in response to this Court's mandate to analyze the *in personam* RICO forfeiture of an entire chain of media businesses, based solely on seven magazines and videotapes found to be obscene, under the Eighth Amendment's Excessive Fines Clause, the Court of Appeals erroneously defined all assets of the businesses – including real property, tens of thousands of videotapes, books and magazines, and many years' income of the business – as "proceeds" not subject to proportionality analysis.

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The opinions subsequent to this Court's remand of this case in *Alexander v. United States*, 509 U.S. 544 (1993), and the original judgment and forfeiture order, are reproduced in the Appendix to this Petition. In reverse chronological order, these decisions include *United States v. Alexander*, 108 F.3d 853 (8th Cir. 1997), attached as Appendix A; it affirms the district court's unreported opinion deciding the forfeiture issue on remand, *United States v. Alexander*, reproduced as Appendix B. Following this Court's remand, the Eighth Circuit issued an opinion remanding to the district court: *United States v. Alexander*, 32 F.3d 1231 (8th Cir. 1994) (Appendix C). The trial court's unreported sentencing judgment and forfeiture orders issued in 1990 are included as Appendix D.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered its decision in this case on March 10, 1997. Justice Thomas granted Petitioner two extensions of time within which to file this petition, ultimately making it due for filing on August 7, 1997. This Court therefore has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Amendment I

Congress shall make no law . . . abridging the freedom of speech, or of the press.

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed . . . .

UNITED STATES CODE

18 U.S.C.A. § 1961 (West Supp. 1991)

As used in this chapter –

(1) "racketeering activity" means . . . (B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . sections 1461-1465 (relating to obscene matter . . . .

18 U.S.C.A. § 1962 (West 1984 and Supp. 1991)

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern or racketeering activity . . . in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. . . .

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . .

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C.A. § 1963 (West Supp. 1991)

(a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years . . . , or both, and shall forfeit to the United States, irrespective of any provision of State law –

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any –

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence

imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection.

STATEMENT OF THE CASE

In its earlier decision in this case, *Alexander v. United States*, 509 U.S. 544 (1993), this Court remanded with instructions to reconsider the massive RICO forfeiture imposed on Petitioner solely for obscenity offenses, in light of the proportionality concerns embedded in the Eighth Amendment's Excessive Fines Clause, as articulated for the first time in this very case and in *Austin v. United States*, 509 U.S. 602 (1993). The courts below have essentially declined to do so, arbitrarily excluding from their analysis millions of dollars of forfeited property as "proceeds" of the "RICO enterprise," on the circular and indefensible theory that all these assets represent illegal "proceeds" from "racketeering activity." The issue Petitioner now raises is a simple one – whether in such forfeiture cases, the revenue and assets acquired with the revenue generated *by the entire business* are automatically forfeitable as "ill-gotten gains" and thus excluded from the Excessive Fines proportionality analysis.

Petitioner Ferris Alexander was originally convicted and sentenced in 1990 under the federal RICO Act, based solely on the distribution of seven media items (magazines and videotapes) determined to be obscene.[1] He was

[1] Petitioner was also convicted of tax offenses, a fact of which the courts below have made much in justification of their

sentenced to six years in prison,[2] and to pay more than $206,000 in fines and assessments. The court levied these punishments in addition to the forfeitures mandated by the RICO Act, 18 U.S.C.A. § 1963(a), which included $8.9 million in cash assets designated as income from the businesses from 1985 through 1988, ten parcels of real property, three vehicles, bank accounts, fourteen operating bookstores and all the personal property, equipment and inventory associated with those businesses.[3]

Petitioner challenged this massive forfeiture of his entire chain of bookstores and video stores as violations of the First and Eighth Amendments. In the first round of this litigation, the courts below rejected all Petitioner's constitutional arguments, quickly dismissing the Eighth Amendment challenge as irrelevant on the supposition that the Eighth Amendment did not require any proportionality review of a sentence less than life imprisonment without parole, as the Court of Appeals held. *See Alexander v. Thornburgh*, 943 F.2d 825, 836 (8th Cir. 1991).

This Court granted certiorari, and although a sharply divided Court rejected Petitioner's First Amendment challenge, unanimously held that the mandatory RICO

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analysis of the entire business as constituting "proceeds" of "racketeering activity." However, the tax offenses constituted no part of the legal basis for the RICO forfeiture, and were punished by the fines imposed in this case.

[2] Petitioner served sixty months in prison; he remains on supervised release.

[3] The inventory of the stores included some 113.8 tons of presumptively protected media materials the Government had simply hauled away and burned upon Petitioner's conviction in 1991.

forfeiture in this case raised serious proportionality concerns under the Eighth Amendment. This Court therefore remanded to the Eighth Circuit for reconsideration of that issue: "We hold . . . that the Court of Appeals should have considered whether [the RICO Act's forfeiture provisions] resulted in an 'excessive' penalty within the meaning of the Eighth Amendment's Excessive Fines Clause." *Alexander*, 509 U.S. 544, 559 (1993).

The Eighth Circuit in turn remanded this case to the district court, suggesting broadly that the entire forfeiture was constitutional. *See* Appendix C. Despite this Court's holding, for the first time, that the Excessive Fines Clause applied to mitigate such forfeitures, the Eighth Circuit endorsed the district court's earlier analysis of all this forfeited property as "proceeds" of the "racketeering enterprise," opining that "the district court would not have ordered forfeiture to the extent that it did if it concluded that there was constitutional disproportionality." App. C at 34-35.

With this prompting, the district court on remand simply reinstated its earlier forfeiture order, holding that Petitioner had failed to make a prima facie showing of disproportionality. Nor, under the court's theory, could he possibly have made such a showing, because the court held that virtually all the forfeited property constituted an "illegal instrument" or "proceeds of criminal activity":

> "The defendant has, certainly, surrendered his interest in the 10 parcels of real estate found to be forfeit by the jury and his interest in the wholesale and retail business which was an instrument of the illegal RICO enterprise. He also forfeited nearly $9 million as proceeds from criminal activity. *But these losses are not subject to an excessive fines analysis, because separation from*

> *proceeds of criminal activity is not punishment."* App. B at 20. (Emphasis added.)

The Eighth Circuit again affirmed, endorsing the district court's conclusion that not only the $8,910,548.10 in income attributed to Petitioner's businesses, but also the real and personal property associated with the businesses, and all their inventory, were automatically forfeitable and thus excluded from the assessment of proportionality under the Excessive Fines Clause:

> "The forfeiture of proceeds from the illegal enterprise is not considered punishment subject to the excessive fines analysis because the forfeiture of proceeds simply deprives the owner of the fruits of his criminal activity. . . . The district court found that the real property, the $8,910,548.10 in proceeds, and the personal property, equipment and inventory located on the premises of the forfeited real property constituted proceeds of Alexander's racketeering enterprise, and were not subject to the excessive fines analysis." 108 F.3d at 855; App. A at 4.

Petitioner now seeks a writ of certiorari with regard to the Court of Appeals' holding to this effect, that all this property was "the fruit of [Petitioner's] RICO violations," and that such "proceeds cannot be included in the proportionality analysis." 108 F.2d at 857-858; App. A at 8, 11.

REASONS FOR GRANTING THE WRIT

The decision below, reaffirming the blanket forfeiture of Petitioner's entire chain of media businesses without meaningful Eighth Amendment scrutiny, does not comport with this Court's clear mandate in *Alexander v. United States*, 509 U.S. 544 (1993), and *Austin v. United States*, 509 U.S. 602 (1993), that such massive forfeitures must be analyzed under the Eighth Amendment as potential violations of the Excessive Fines Clause. Instead of engaging in an appropriate proportionality analysis, the courts below have essentially defined the issue away, by holding that business assets, including real and personal property, vast inventories of presumptively protected media materials, and almost $9 million in income attributed to the businesses were all simply the "proceeds" of "racketeering activity" and therefore to be excluded from the inquiry under the Excessive Fines Clause. They have thereby reduced the nascent Eighth Amendment inquiry to a nullity.

In taking this approach, the Eighth Circuit has essentially treated Petitioner's RICO forfeiture as if it were an *in rem* forfeiture of an offending instrumentality, rather than the *in personam* forfeiture actually imposed under the RICO Act, as this Court noted: "Unlike *Austin*, this case involves *in personam* criminal forfeiture not *in rem* forfeiture, so there was no threshold question concerning the applicability of the Eighth Amendment." 509 U.S. at 559, n. 4. Moreover, in *Austin*, this Court held that even *in rem* forfeitures are subject to the constitutional constraint of proportionality under the Excessive Fines Clause.

The courts below have thus both ignored this Court's mandate, and diverged sharply from the more appropriate analysis applied by other circuits, in a number of cases applying a proportionality standard consistent with this Court's Eighth Amendment jurisprudence. The Eighth Circuit's decision creates a vast disparity among the circuits.

Moreover, this decision imports a constitutionally unwarranted assumption that all the media materials Petitioner sold over a number of years were, because of their sexual content, part of a course of illegal "racketeering activity." In this regard, it flatly contradicts this Court's numerous cases holding that expressive materials are presumptively protected under the First Amendment, unless and until judicially determined obscene.

Both to resolve this stark disparity among the federal circuits and to reaffirm important First and Eighth Amendment principles, the Eighth Circuit's anomalous approach requires this Court's review.

I. The Eighth Circuit's Rule Excluding From Proportionality Analysis All Assets Of A Business Implicated In RICO Violations Conflicts With This Court's Decisions Under The First And Eighth Amendments.

In its 1993 decision in this case, this Court was unquestionably troubled by the threat of wholesale forfeitures of companies engaged in mostly legitimate (and in this case, constitutionally protected) activities, on the basis of isolated offenses constituting a small percentage of their transactions. That concern, expressed repeatedly

in the oral argument of this case, was presumably the basis for the Court's decision and remand in this case. The remand apparently reflected the Court's perception that the massive forfeiture in this case was at least arguably disproportionate to the RICO/obscenity predicates based solely on seven obscene magazines and videotapes – a conclusion other circuits clearly would have reached on these facts (see II, infra).

This Court decided for the first time in this case and the tandem case of *Austin v. United States*, 509 U.S. at 622-623, that the Eighth Amendment should be applied to evaluate criminal and civil forfeitures, and in particular that "the forfeiture in this case should be analyzed under the Excessive Fines Clause." *Alexander*, 509 U.S. at 559. Although in both decisions, this Court left to the lower courts' judgment in the first instance the formulation of an approach to determine proportionality under the Excessive Fines Clause, its mandate was clear that such scrutiny should recognize a serious constitutional limitation on the magnitude of forfeitures in such cases: "The purpose of the Eighth Amendment . . . was to limit the government's power to punish." *Austin*, 509 U.S. at 609.

Yet the Eighth Circuit has avoided the task of subjecting forfeitures to meaningful constitutional scrutiny. In circular fashion, the court simply took the statutory scope of forfeitable property, defined all such business assets as "proceeds" or "fruits of illegality" and therefore excluded them from the purview of Excessive Fines Clause analysis. Under this approach, the court has rendered proportionality analysis essentially meaningless – virtually all corporate property becomes "proceeds" on the theory

that it flowed from operation of the "racketeering enterprise," leaving nothing to be evaluated in relation to the triggering illegal conduct.

Surely, in remanding with instructions to the Eighth Circuit not only to apply the Excessive Fines Clause to this case, but moreover to craft standards for applying this newly-announced doctrine to future cases, this Court did not intend to solicit mere conclusory reasoning to effectively rubber-stamp the lower courts' previous results and conclusions. Rather, this Court must have intended the thoughtful development of criteria that would effectively temper the mandatory, often massive forfeitures the RICO Act requires, in cases of modest wrongdoing in relation to a forfeiture such as that imposed on Petitioner.

As noted above, the Court repeatedly expressed this concern at oral argument of this case in 1993. *See* Appendix F, Excerpts of Oral Argument in *Alexander v. United States*, App. F at 79-86. The Court asked with apparent concern whether RICO would mandate the forfeiture of American Airlines in its entirety if it were convicted of two predicate obscenity offenses. Undersigned counsel responded that the RICO Act did indeed mandate such a forfeiture as a matter of statutory construction, but argued that such a forfeiture would violate the Eighth Amendment, as the Ninth Circuit had held in *United States v. Busher*, 817 F.2d 1409 (9th Cir. 1987). When the government was pressed on this point, the Solicitor General temporized regarding the application of the statute, but otherwise could offer no serious defense of the blanket forfeitures under the Eighth Amendment. App. F at 82-86. His only answer to the Eighth Amendment

dilemma was the definitional tautology the courts below have also offered: that forfeiture "is not disproportionate when . . . the enterprise is being used as the instrument for carrying out the criminal activity." App. F at 86.

Under this approach, as embraced by the Eighth Circuit, this Court's concerns regarding mandatory forfeitures of the entire business remain unaddressed. American Airlines would be forfeited in its entirety if convicted of two obscenity offenses as RICO predicates, because the Eighth Circuit would define all of the conduct of the convicted giant corporation as the "racketeering activity," all revenues from which would be excluded from proportionality analysis because they would be designated "proceeds" or "fruits of illegality."

In one other crucial regard, relating particularly to such cases in which forfeiture is predicated solely on obscenity offenses, this decision undermines decades of this Court's unwavering decisions. This Court has always held that media materials are presumptively protected by the First Amendment. However, the courts below unquestionably based their conclusion that Petitioner's entire chain of businesses was "an enormous racketeering enterprise" on the fact that the businesses in question distributed sexually oriented or erotic materials. Repeatedly in the opinions below, the courts refer to this fact as justification for the conclusion that all assets were forfeitable as "proceeds," without the need for Excessive Fines analysis. See App. at 29, 30. As the Court of Appeals quoted the district court with obvious approval:

> " 'A cursory review of those videos and magazines supplied by the government reveals that defendant acquired and distributed scores of

> materials which were similar in nature to those declared obscene. The Court has little doubt the inventory of videos and magazines held at the various properties previously determined forfeitable were part and parcel of defendant's racketeering schemes.' " App. C at 30.

To the extent this conclusion was based on the assumption that all these erotic materials, neither judicially determined nor even charged as obscene, were contraband, the sale of which generated "illegal proceeds," it is equally inconsistent with well settled constitutional doctrine. This rationale flies in the face of innumerable decisions by this Court stressing that materials not adjudicated obscene are presumptively protected under the First Amendment. *See, e.g., Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 63 (1989), and cases cited therein. As this Court noted in oral argument in this case, remonstrating with Solicitor General Starr when he made the same bald assertion that the non-obscene erotic inventory gave rise to "rackeering" proceeds:

> "[T]here is a crucial constitutional difference depending on whether there are six pieces which are obscene and 600,000 which are merely erotic. And it seems to me that your argument rests upon the identification of what is assumed . . . to be simply erotic adult material with the six which were shown to be obscene. . . . I don't see how that's a legitimate basis. I don't see how we can assume the identity of eroticism with obscenity."

App. F at 85-86.

Thus the courts below were constitutionally awry on any theory upon which they might have relied to substantiate their view that virtually all of Petitioner's property constituted "illegal proceeds," so that the forfeiture was immune from Eighth Amendment scrutiny. To simply define all the property as excludable "proceeds," merely because it was the product of sales at business locations under common ownership with those at which a total of seven obscene items were sold, finesses this Court's holding in this case and in *Austin*, that the Excessive Fines Clause prohibits grossly disproportionate forfeitures. Likewise, the assumption that the businesses constituted "an enormous racketeering enterprise" because they disseminated presumptively protected erotic materials abrogates many decades of this Court's First Amendment jurisprudence.

In order to clarify these points, and in particular the necessity of meaningful proportionality scrutiny under the Excessive Fines Clause, this Court's review of this case is essential.

II. The Eighth Circuit's Rule Allowing The Automatic Forfeiture Of All Assets Of The "Racketeering Enterprise" Directly Conflicts With Other Federal Circuits' Eighth Amendment Proportionality Analysis.

This Court's apparent concern that wholesale forefeitures not be mandatorily imposed without regard to the Eighth Amendment had been anticipated by some lower courts, before this Court's decisions in this case and in *Austin*, that such forfeitures must be analyzed under the

Excessive Fines Clause. These courts began then to apply an appropriate Eighth Amendment proportionality analysis to forfeitures, taking an approach with which the decisions of the courts below are completely at loggerheads. The Eighth Circuit's analysis is, for example, directly in conflict with the Ninth Circuit's approach to this precise issue of RICO/obscenity forfeitures in *Adult Video Association v. Barr*, 960 F.2d 781 (9th Cir. 1992).

The Ninth Circuit has long applied proportionality analysis to RICO forfeitures, and would unquestionably conclude that the Excessive Fines Clause requires reduction of the forfeiture in this case. In *United States v. Busher*, 817 F.2d 1409, 1415 (9th Cir. 1987), Judge Kozinski for a unanimous panel held that where the defendant makes a prima facie showing that a forfeiture may be excessive, the trial court must make an Eighth Amendment proportionality inquiry, considering the total penalty imposed in light of the gravity of the offense. "Since RICO's forfeiture provision is quite literally without limitation," the court emphasized, "it may well exceed constitutional bounds in any particular case." 817 F.2d at 1414.

> "The court should be reluctant to order forfeiture of a defendant's entire interest in an enterprise that is essentially legitimate where he has committed relatively minor RICO violations . . . resulting in relatively little illegal gain in proportion to its size and legitimate income."

Id. at 1415-1416.

The *Busher* court relied upon the proportionality analysis this Court advanced in *Solem v. Helm*, 463 U.S. 277 (1983), noting also the requirement this Court had

stressed in *Robinson v. California*, 370 U.S. 660 (1962), "that the excessiveness of a punishment be determined not in the abstract, but in light of the *specific nature of the crime* for which the defendant was convicted." 817 F.2d at 1414 (emphasis added). Applying this proportionality analysis, the Ninth Circuit held that the forfeiture of the defendant's entire 92% interest in a corporation worth approximately $3 million, plus his own contracting company and real estate, must be reviewed for disproportionality in relation to his fraudulent conduct and tax evasion amounting to some $335,000. *Id.*

Subsequently, and shortly before this Court decided *Alexander*, the Ninth Circuit relied in part on *Busher* in resolving this very issue of the constitutionality of RICO/obscenity forfeitures, in *Adult Video Association v. Barr*, 960 F.2d 781 (9th Cir. 1992). The court cited *Busher* extensively for the proposition that total forfeiture would be an inappropriate remedy for obscenity offenses in all but the most exceptional circumstances. 960 F.2d at 790-791.

> "At the very least, those assets or interests of the defendant invested in legitimate expressive activity being conducted by parts of the enterprise uninvolved or only marginally involved in the racketeering activity may not be forfeited. As in *Busher*, district courts should not, absent exceptional circumstances, 'order forfeiture of a defendant's entire interest in an enterprise that is essentially legitimate where he has committed relatively minor RICO [obscenity] violations . . . resulting in relatively little illegal gain in proportion to its size and legitimate income.' "

Id. at 791.

Under this standard, the Ninth Circuit has consistently applied a searching proportionality analysis. *See also, United States v. Real Property Located in El Dorado County*, 59 F.3d 974 (1994); *United States v. Feldman*, 853 F.2d 648 (9th Cir. 1988). Given the constitutional presumption of First Amendment protection, it would unquestionably conclude that the wholesale forfeiture of Petitioner's expressive businesses was disproportionate to the seven media items found to be obscene, in comparison with the overwhelmingly lawful scope of those businesses. It certainly would not exclude virtually all the forfeited property from its Eighth Amendment analysis on the premise that it all represented "illegal proceeds."

Other circuits have also applied a proportionality analysis consistent with this Court's Eighth Amendment jurisprudence, and utterly inconsistent with the Eighth Circuit's approach. There is no indication that they would have excluded virtually all the property forfeited in this case from the proportionality calculus, rather than subjecting any such forfeiture to meaningful scrutiny which would require its mitigation.

For example, the Third Circuit in *United States v. Sarbello*, 985 F.2d 716 (3rd Cir. 1993), also decided shortly before this Court decided *Austin* and *Alexander*, held that forfeiture of the defendant's entire interest in a RICO enterprise was prima facie disproportionate where the jury found a small degree of criminal taint in relation to legitimate business activity. The court relied on *Solem v. Helm*'s touchstone comparison of "the gravity of the offense and the harshness of the penalty," among other factors, and remanded for a proportionality evaluation. 985 F.2d at 722-724. The court also relied on decisions of

the First and Second Circuits, applying a similar analysis to RICO forfeitures: *United States v. Anguilo*, 897 F.2d 1169, 1211-1212 (1st Cir.), *cert. denied*, 498 U.S. 845 (1990), and *United States v. Porcelli*, 865 F.2d 1352, 1365 (2nd Cir.), *cert. denied*, 493 U.S. 810 (1989)

The Fourth Circuit in *United States v. Wild*, 47 F.3d 669 (4th Cir. 1995), has also followed the mandate of this Court's decision in *Austin* and applied proportionality analysis to the *in personam* forfeiture of a residence implicated in the defendant's drug offenses. Remanding to the trial court, the Fourth Circuit instructed that the proportionality inquiry focus on "whether the value of the property being forfeited is an excessive monetary punishment in relation to the offense. . . . This inquiry beckons a comparison of the value of the property being forfeited to the gravity of the offense committed by the defendant and the nature and extent of the defendant's activities." 47 F.3d at 676. The court distinguished as "proceeds" excludable from this calculus only the statutorily-limited forfeiture of proceeds from the criminal conduct itself. *Id.* at 675.

The Tenth Circuit has also held that "courts must consider all factors" in applying proportionality analysis to determine whether an *in personam* forfeiture is constitutionally excessive. *United States v. Libretti*, 38 F.3d 523 (10th Cir. 1994). The Eleventh Circuit in *United States v. One Parcel of Propery Located at 427 and 429 Hall Street*, 74 F.3d 1165 (11th Cir 1996), has likewise seriously applied the Excessive Fines Clause, "which necessarily implies a comparison of the amount of the fine with the acts of the individual." 74 F.3d at 1171.

None of these other courts has suggested that the question of proportionality may effectively be averted by simply defining all the forfeited property as "proceeds" of the offense. It is quite clear from these decisions that other circuits – most explicitly the Ninth Circuit – would have not only found a prima facie showing of gross disproportionality in this case, but indeed would have reduced the amount of the forfeiture on these facts. Their analysis of forfeitures under the proportionality principle is entirely inconsistent with the tautological, and essentially meaningless, approach the Eighth Circuit has taken to the serious constitutional dilemma of mandatory forfeitures under the Excessive Fines Clause. This Court's review is urgently required to address this disparity among the federal circuits on a matter of great constitutional importance.

CONCLUSION

For all the foregoing reasons, the Petitioner respectfully urges this Court to grant a writ of certiorari, to reverse the decision below, and to remand for reconsideration of the excessiveness of the forfeitures imposed in this case, under the Eighth Amendment.

Respectfully submitted,

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APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Ferris ALEXANDER,
Defendant-Appellant.

No. 90-5417.

United States Court of Appeals,
Eighth Circuit.

Submitted Sept. 11, 1996.

Decided March 10, 1997.

After the United States Supreme Court, Chief Justice Rehnquist, 509 U.S. 544, 113 S.Ct. 2766, 125 L.Ed.2d 441, vacated affirmance of forfeiture order against defendant who was convicted of tax and obscenity offenses and Racketeer Influenced and Corrupt Organization Act violations and remanded for consideration of whether forfeiture violated constitutional prohibition on excessive fines, the Court of Appeals, 32 F.3d 1231, remanded. The United States District Court for the District of Minnesota, James M. Rosenbaum, J., held that defendant failed to make prima facie case of disproportionality. Defendant appealed. The Court of Appeals, John R. Gibson, Circuit Judge, held that: (1) district court did not improperly compare forfeiture to defendant's net worth; (2) proportionality analysis was not limited to comparison of number of items specifically found to be obscene with amount of forfeiture; (3) proceeds of racketeering enterprise were properly excluded from proportionality analysis; and (4) due process did not relieve defendant of burden to show gross disproportionality.

Affirmed.

John Haldane Weston, Beverly Hills, CA, argued (G. Randall Garrou, on the brief), for Defendant-Appellant.

Paul Anthony Murphy, Assistant U.S. Attorney, Minneapolis, MN, argued, for Plaintiff-Appellee.

Before WOLLMAN, FLOYD R. GIBSON, and JOHN R. GIBSON, Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

Ferris Alexander is before us again. The United States Supreme Court remanded this case for a determination of whether the forfeiture of Alexander's property under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1994), violated the Eighth Amendment prohibition against excessive fines. *Alexander v. United States*, 509 U.S. 544, 559, 113 S.Ct. 2766, 2776, 125 L.Ed.2d 441 (1993). Following our remand to the district court, *United States v. Alexander*, 32 F.3d 1231 (8th Cir. 1994) (*Alexander II*), the district court[1] held that Alexander failed to make a prima facie case of disproportionality, and Alexander appeals this order. Alexander argues that the forfeiture of his property was prima facie disproportionate, and thus, constituted an excessive fine. He argues that the district court ignored uncontroverted valuation evidence, erroneously excluded property forfeited from the proportionality analysis, and misconstrued the legal and factual tests applicable to a proportionality analysis. We affirm.

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[1] The Honorable James M. Rosenbaum, United States District Judge for the District of Minnesota.

The details of Alexander's convictions and forfeiture of property are set forth in *Alexander v. Thornburgh*, 943 F.2d 825, 826-29 (8th Cir. 1991) (*Alexander I*), *Alexander II*, 32 F.3d at 1233-34 (8th Cir. 1994), and *Alexander*, 509 U.S. at 547-49, 113 S.Ct. at 2769-71.[2] We affirmed the district court's forfeiture order, 943 F.2d at 832-36. The Supreme Court reversed and remanded for consideration of whether the forfeiture of Alexander's property violated the Eighth Amendment's prohibition against excessive fines. 509 U.S. at 559, 113 S.Ct. at 2776. We, in turn, remanded the case to the district court to consider this issue and to take additional evidence as it deemed appropriate. *Alexander II*, 32 F.3d at 1235. In our remand order, we outlined a number of principles the district court might consider in its proportionality analysis, giving the district court full discretion to develop the record and make appropriate findings. *Id.* at 1235-37.

In considering Alexander's argument that the forfeiture of his property constituted an excessive fine, the district court recognized this court's instruction that it must distinguish proceeds of the racketeering activity and property which facilitates or affords a source of

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[2] In his brief, Alexander identifies and values the items forfeited: ten parcels of real property valued at $1,040,334.06; fifteen bank accounts totalling $5,017.47; fourteen bookstores valued at least at $2,000,000; personal property and equipment liquidated at auction and private sale for $47,297.47; 113.8 tons of "presumptively protected" magazines, videos, and novelties; 1,033 boxes of magazines, videos, and novelty items from a California warehouse; three motor vehicles valued at $12,000; and monies acquired from the RICO enterprise from the years 1985 through 1988, totalling $8,910,548.10.

influence over the illegal enterprise. *See* 32 F.3d at 1236. The forfeiture of proceeds from the illegal enterprise is not considered punishment subject to the excessive fines analysis because the forfeiture of proceeds simply deprives the owner of the fruits of his criminal activity. *See id.* The district court found that the real property, the $8,910,548.10 in proceeds, and the personal property, equipment, and inventory located on the premises of the forfeited real property constituted proceeds of Alexander's racketeering enterprise, and were not subject to the excessive fines analysis. The court determined that it would only include Alexander's personally held real property and business interests in the amount forfeited for the purpose of the proportionality analysis.

The district court recognized that Alexander must make a prima facie showing of gross disproportionality before the court will consider the government's counter-evidence of just proportionality. Following this court's suggestion, the district court stated that, to determine if Alexander made a prima facie showing of gross disproportionality, it must compare the extent and duration of Alexander's criminal activities with the amount of property forfeited. The court decided that Alexander had the burden to make at least a preliminary showing of the sums forfeited, and to demonstrate a disproportionality between the forfeiture and his crime. The court concluded that Alexander "entirely failed to come forward with any cognizable evidence establishing the dollar value of his holdings." The court specifically referred to the several amounts Alexander claimed to have held, varying from "$25 million," to "many millions" to "$2 million." The court pointed out that Alexander failed to

submit any evidence of the value of his business, such as a certified appraisal, audited financial statements, or any value based on a capitalization of income stream, an offer of a comparable sale, or a specific asset listing and valuation. Because the court could not calculate "base holdings," the court concluded it was impossible to determine the proportion of fines and, ultimately, determine if the forfeiture was disproportionate.

The court also commented on Alexander's lack of credibility based on discrepancies in Alexander's trial testimony and his declarations. Alexander had stated to the Supreme Court that his business was worth $25 million, but on his Chapter 7 bankruptcy schedule, he stated, under penalty of perjury, that his business was worth approximately $2 million. The court found "unworthy of belief," Alexander's valuation of his assets. The court referred to evidence that Alexander failed to keep records of receipts and that there were "vast unreported sums of money." As one example, the court recounted evidence that Alexander maintained only a personal monthly declaration of quarters he collected and counted from unmetered "peep show" vending machines, and that these records did not square with testimony from a bank employee who stated that Alexander deposited substantial amounts of quarters into different bank accounts, often retaining large amounts of cash in $50 and $100 denominations. The court stated that between the time of Alexander's conviction and the seizure of his assets, Alexander requested and received control of his business and assets and, during that time, he "secreted assets, attempted bulk sales, and engaged in . . . a series of shenanigans designed to obstruct th[e] Court's orderly

processes and enrich himself before the marshal [sic] seized his inventory and equipment." Under these circumstances, the court concluded that the United States had no duty to inventory Alexander's holdings and rejected Alexander's argument that he should be relieved of his burden to show gross disproportionality.

The district court then considered the extent and duration of Alexander's criminal activities. The court compared Alexander's maximum consecutive sentences (171 years and statutory fines of $6,400,000) with his imposed sentence (72 months and $100,000 fine, special assessments, and costs), specifically noting that the court did not order a higher fine because of the forfeiture. The court concluded that the imposed sentence was appropriate and Alexander failed to make any showing that the forfeiture was grossly disproportionate to his criminal activity.

Alexander now argues that the district court incorrectly conducted the proportionality analysis. Alexander perceives five problems with the court's conclusion that he failed to make a prima facie case of disproportionality. He argues that the court: (1) ignored uncontroverted evidence in the record regarding the value of property forfeited; (2) misconstrued the legal and factual test applicable to the proportionality analysis; (3) erroneously excluded at least $8.9 million from the proportionality analysis; (4) erroneously focused on facts relating to the tax counts; and (5) erroneously failed to hold as a matter of due process that Alexander had met his burden of establishing a prima facie case of disproportionality.

I.

Alexander first claims that the district court ignored uncontroverted valuation evidence. He argues that the court failed to acknowledge the evidence of value of the United States Marshall appointed by the court to "apprise" the forfeited property, who he says valued the forfeited property at around $10,017,197.10. Alexander stresses that this amount did not even include the entire amount of the forfeiture, as the ten million dollar figure did not include the value of the fourteen ongoing businesses and 114 tons of seized inventory.

Alexander's characterization of the affidavit is not accurate. Pursuant to a district court order, the United States Marshall Service was authorized and directed to dispose of forfeited property, not value the property.[3] The affidavit sets forth the net proceeds of the property seized, and does not "value" the seized property at anywhere near ten million dollars.[4] The affidavit contains nothing to cause us to conclude that the district court ignored valuation evidence or erred in conducting its proportionality analysis.

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[3] The government explains that the term "apprise" means to "advise, counsel, inform, notify, and warn," it does not mean to appraise or value.

[4] The affidavit sets forth the net proceeds the government received from disposing the property seized as a result of the forfeiture: real estate – $659,344.58; cash – $2,185.13; bank accounts – $5,017.47; and contents of businesses – $49,297.47.

II.

Alexander next contends that the district court incorrectly analyzed the proportionality question. He directs us to our remand order in which we suggest that the district court compare "the extent of the criminal activity and the quantum of property forfeited." *Alexander II*, 32 F.3d at 1236. He alleges that the district court added the further requirement, unsupported by the case law, of requiring him to establish the sums he originally possessed. He characterizes the district court's analysis as a comparison of the forfeiture to his net worth, not as a comparison of the forfeiture to his criminal activities.

The district court, following our suggestion, considered whether the forfeiture constituted an excessive fine by comparing the extent and duration of Alexander's criminal activities with the amount of property forfeited. *See id.* Contrary to Alexander's argument, the district court did not compare the amount of the forfeiture to Alexander's net worth. The court was simply trying to ascertain the amount forfeited by determining the amount of Alexander's property that was not the fruit of his RICO violations.

Alexander further contends that applying the inquiries articulated by *United States v. Busher*, 817 F.2d 1409, 1415 (9th Cir.1987), and *United States v. Sarbello*, 985 F.2d 716, 721-25 (3d Cir.1993), he has made a prima facie case of gross disproportionality.[5] As Alexander stressed

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[5] Alexander identifies the following factors from *Busher* and *Sarbello* as critical to the disproportionality analysis: (1) the circumstances surrounding the defendant's criminal conduct;

in his earlier appeals, he complains that he was convicted of three RICO counts predicated on seven items of obscene materials, and the dollar value of these obscene materials was "infinitesimal" when compared to the volume of the sale of other protected expressive material. Alexander's argument essentially asks us to limit the proportionality analysis to a comparison of the number of magazines and videos specifically found by the jury to be obscene to the dollar amount of the forfeiture. The Supreme Court, however, implicitly rejected this same argument:

> [Alexander] contends that forfeiture of his entire business was an "excessive" penalty for the Government to exact "[o]n the basis of a few materials the jury ultimately decided were obscene." It is somewhat misleading, we think, to characterize the racketeering crimes for which [Alexander] was convicted as involving just a few materials ultimately found to be obscene. Alexander was convicted of creating

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(2) the harm suffered by the victim and the defendant's culpability; (3) the dollar volume of the loss caused, whether physical harm to persons was inflicted, threatened or risked, or whether the crime had severe collateral consequences; (4) the benefit reaped by the defendant; (5) the defendant's state of mind and motive; and (6) the degree to which the enterprise operated by the defendant was infected by criminal conduct. The Supreme Court declined to establish a multifactor test for determining when a fine is unconstitutionally excessive, leaving the lower courts free to develop their own tests. *See Austin v. United States*, 509 U.S. 602, 622-23, 113 S.Ct. 2801, 2812-13, 125 L.Ed.2d 488 (1993). We have considered many of the factors urged by Alexander. *See United States v. Bieri*, 68 F.3d 232, 236 (8th Cir.1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 1876, 135 L.Ed.2d 172 (1996).

> and managing what the District Court described as "an enormous racketeering enterprise." It is in the light of the extensive criminal activities which [Alexander] apparently conducted through this racketeering enterprise over a substantial period of time that the question whether the forfeiture was "excessive" must be considered.

Alexander, 509 U.S. at 559, 113 S.Ct. at 2776 (citations to record omitted). The district court did not err in conducting its proportionality analysis.

III.

Alexander further contends that the district court abused its discretion and clearly erred in finding that the entire $8.9 million included in the forfeiture order[6] constituted "proceeds" of the racketeering enterprise. Alexander restates his argument presented in this and earlier appeals, attacking the forfeiture of the fourteen bookstores and theaters based on findings that three videotapes and four magazines were obscene. He does not dispute that the business may have generated $8.9 million during the years 1985 through 1988; rather, his objection is to the district court's conclusion that the entire $8.9 million is proceeds and is not included in the Eighth Amendment analysis. He suggests that the proceeds from the seven items found to be unlawful, and perhaps the

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[6] The district court ordered the forfeiture of $8,910,548.10 as proceeds obtained from the racketeering activity. The government contends that in light of Alexander's financial situation, including his tax liability and Chapter 7 bankruptcy, this amount is unlikely to be collected.

multiple copies, are all that can be excluded from the proportionality analysis.

In remanding the case to the district court, we instructed that "[f]orfeiture of proceeds cannot be considered punishment, and thus, subject to the excessive fines clause, as it simply parts the owner from the fruits of the criminal activity." *Alexander II*, 32 F.3d at 1236. The district court made explicit its earlier finding that the forfeiture of $8,910,548.10 constituted proceeds of Alexander's racketeering enterprise. This amount represented proceeds which Alexander obtained directly or indirectly from his racketeering activities for the years 1985 through 1988.

We have already decided that proceeds cannot be included in the proportionality analysis. *See id.* The only question remaining is whether the forfeiture ordered constitutes an excessive fine. We have no hesitation in concluding that the district court did not err in excluding the $8.9 million from its proportionality analysis. The jury found this amount forfeitable as proceeds of the racketeering activity for the years 1985 through 1988. The district court concluded that "the proceeds were inextricably tied to an enormous racketeering enterprise." Alexander has not presented any cogent argument explaining why the jury and district court determination as to the amount of proceeds from the racketeering enterprise should not stand.

IV.

Alexander also argues that the district court erred by focusing on facts relating to the tax counts in concluding

that the forfeiture was not excessive. He claims the non-RICO tax counts are irrelevant in evaluating gross disproportionality.

Alexander's indictment set forth the racketeering enterprise and the purpose of the enterprise, as well as the extensive means and methods that Alexander used to conduct the enterprise. The indictment incorporated allegations of the tax counts as "means and methods" by which Alexander "conducted and participated in the conduct of affairs of the enterprise." Accordingly, the court did not err in considering the entire record, including the tax counts, in deciding whether the forfeiture constituted an excessive fine.

V.

Finally, Alexander argues that due process requires that he be relieved of his burden to show gross disproportionality because the United States Marshall made no detailed inventory or appraisal of the business's videos, magazines, and other items at the time they were seized. He contends that it is impossible for him to determine the total value of the property forfeited because the government destroyed approximately "114 tons of presumptively protected magazines and videotapes."

The district court rejected Alexander's due process argument, observing that Alexander was attempting to turn his obligation to present valuation evidence at the forfeiture hearing into a duty imposed on the Marshall to make an inventory at the time of seizure.

We see no circumstance here excusing Alexander from showing disproportionality. The record is replete with examples of Alexander's attempts to frustrate the valuation of his property as well as dissipate assets between the time of his conviction and the seizure of assets. We reject Alexander's due process argument.

We affirm the judgment of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
4-89-CR-85(01)

United States of America	)	
	)	ORDER
v.	)	
	)	(Filed Mar. 21, 1996)
Ferris J. Alexander	)	

This matter is before the Court on remand from the Eighth Circuit Court of Appeals. This Court is directed to consider whether its forfeiture orders of August 6, August 7, and August 10, 1990, and its Judgment of August 13, 1990, violate the Eighth Amendment's prohibition against excessive fines.[1] *See United States v. Ferris J. Alexander*, 32 F.3d 1231, 1237 (8th Cir. 1994). On remand, the parties have filed cross-motions.

The government asks the Court to reaffirm its sentence and forfeiture orders. Defendant seeks mitigation. After considering the guidance of the United States Supreme Court opinion in *Ferris J. Alexander v. United States*, ___ U.S. ___, 113 S.Ct. 2766 (1993), the Eighth Circuit Court of Appeals, and the submissions of the parties, the Court affirms its prior sentence and forfeiture.

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[1] The United States Constitution, Amendment VIII, provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

I. Background

After an almost four month trial, defendant was convicted of 25 criminal counts. These included conspiracy to defraud the United States by impeding the lawful functions of the Internal Revenue Service ("IRS") by filing false income tax returns; violating the Racketeering Influenced Corrupt Organization Act ("RICO"), 18 U.S.C. § 1962, by engaging in, or conducting an enterprise through, a pattern of racketeering activity; receipt and use of income derived from a pattern of racketeering activity and investing racketeering proceeds; interstate transportation of obscene material for the purpose of sale or distribution; engaging in the business of selling or transferring obscene material; and falsely misrepresenting a social security number for the purpose of impeding the IRS.

Following their guilty verdicts, the same jury reconvened to consider forfeiture, pursuant to 18 U.S.C. § 1963(a)(2). The jury unanimously found in favor of the government as to defendant's interest in 10 parcels of real property, and against the government concerning 4 parcels of real property and 5 items of personalty.[2] Pursuant to the jury's verdict, the government seized the 10 parcels of real estate.

At sentencing, the Court imposed a $100,000.00 fine and ordered defendant to pay the costs of his prosecution, incarceration, and supervised release. Defendant

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[2] Special Verdict Form as to Ferris Alexander, Items 6, 7, 9, 22, 36, 37, 45, 47, and 50. *See United States v. Alexander*, 4-89-CR-85(01) (docket no. 146).

was further ordered to forfeit $8,910,548.10 as money acquired, maintained, or constituting proceeds obtained from racketeering activity between 1985 and 1988. *See United States v. Alexander*, No. 4-89-CR-85(01), Order and Judgment of Forfeiture, slip op. at 6 and 11 (D. Minn. Aug. 6, 1990) (docket no. 167).

Each of the 25 counts of conviction bore a statutory maximum fine: the 2 counts of filing false income tax returns each had a maximum fine of $100,000.00, plus recoupment of unreported sums for tax years 1982 and 1983; the racketeering counts carried a maximum fine of two times the gross profits or proceeds derived from the racketeering activity; 8 of the interstate transportation of obscene material for sale or distribution counts bore maximum fines of $250,000.00; 4 of the counts for interstate transportation of obscene material for sale or distribution bore maximum fines of $5,000.00;[3] the 5 counts of engaging in the business of selling or transferring obscene material each had a maximum fine of $250,000.00; and the count for use of a false social security number had a maximum fine of $250,000.00. The government argued for a $2.7 million fine for the tax counts alone, based on lost tax revenue. The Sentencing Guidelines in effect at the

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[3] For crimes committed after January 1, 1985, Congress raised the maximum fine amount for felonies to $250,000.00, unless the statutory offense calls for a higher amount. *See* Criminal Fine Enforcement Act of 1984 ("CFEA"). Pub. L. No. 98-596 (codified at 18 U.S.C. § 3571(b)(1) and (3)). Counts 21, 22, 28, and 30 of the Indictment charged defendant for acts occurring in 1984, prior to the effective date of the CFEA. Accordingly, the applicable maximum fine for Counts 21, 22, 28, and 30 is $5,000.00 as set forth at 18 U.S.C. § 1465 (1984).

time of sentence prescribed a fine between $10,000.00 and $100,000.00. *See* U.S.S.G. § 5E1.2(c)(1)(A) and (c)(2)(A).

In lieu of either the statutory fines for one or more of the many crimes of conviction or the Sentencing Guideline formula, the Court elected to forfeit the defendant's RICO proceeds and instrumentalities. *See* Sentencing Transcript, pp. 41-43 and 74-75 (docket no. 200). "In enacting RICO, and in granting its large penal power, Congress made clear its intent: a RICO enterprise is to be dismantled, root and branch." *See United States v. Alexander*, 4-89-CR-85(01), Order, slip op. at 13 (D. Minn. Aug. 10, 1990) (docket no. 170); *see also* 18 U.S.C. §§ 1962 and 1963.

As a result, the Court ordered seizure of the RICO-forfeit properties and all appurtenant personalty. The defendant's proportionality complaint derives from his estimate that the total forfeit approximates at least $9 million.

II. Analysis

A. The Imposed Sentence.

The excessive fines clause limits the government's power to extract payments, whether in cash or in kind, as punishment for an offense. *Ferris J. Alexander v. United States*, ___ U.S. ___, ___, 113 S.Ct. 2766, 2775 (1993). When undertaking an excessive fines analysis, the Court must distinguish between proceeds of racketeering activity and property which facilitates or affords defendant a source of influence over the illegal enterprise. *Alexander*, 32 F.3d at 1236.

> Forfeiture of proceeds cannot be considered punishment, and thus, subject to the excessive fines clause, as it simply parts the owner from the fruits of the criminal activity.

Id. In other words, a RICO forfeiture simply cleaves the wrongdoer from his ill-gotten gains. The Court now makes explicit that it previously considered, and presently finds, the forfeit sum of $8,910,548.10 to be proceeds of defendant's racketeering enterprise.

The Eighth Circuit recognized that the RICO forfeitures were based on findings by a jury and this Court's factual findings and analysis. *Id.* at 1235. The RICO statute provides for forfeiture of personal property, equipment, and inventory used in convicted racketeering activity. *See* 18 U.S.C. § 1963(a)(1) and (a)(3); *Alexander*, ___ U.S. at ___; 113 S.Ct. at 2772. Under this authority, the Court forfeit [sic] videos, video cassette recorders, projectors, furniture, and other inventory located on the premises of forfeit real property.

B. Proportionality Claim.

In order for defendant to succeed on his claim of an excessive fine, he must make a prima facie showing of gross disproportionality. *Alexander*, 32 F.3d at 1235. If defendant carries this burden, the Court is to consider the government's evidence of "just proportionality" and analyze in detail whether there has been a violation of the excessive fines clause. *Id.* at 1235-36.

By definition, a proportion is a relationship between two sums. *See* Webster's Third New International Dictionary. Here, the imposed penalty, even if not precisely

valued, is established. But, the other number, to which it must be in proper relation, is the sum originally possessed by the defendant. To sustain his burden, then, defendant is required to make at least a preliminary showing of the sums he possessed in order to demonstrate a disproportionality between that sum and the amount of the forfeiture. *Id.* at 1236.[4]

The Eighth Circuit clearly indicated that the burden of proof for any claimed disproportionality of an otherwise legal sentence lies with the party asserting the Eighth Amendment violation. *Id.* at 1237. This fact notwithstanding, the Court finds the defendant has entirely failed to come forward with any cognizable evidence establishing the dollar value of his holdings. He has, variously, asserted a deprivation of $25 million, "many millions," or $2 million, as it has suited his purpose. *See Alexander v. United States*, Petitioner's Brief to the United States Supreme Court, 1992 WL 511951 at ** 1, 10, 40, and 48; Defendant's Memorandum in Support of his Motion to Mitigate his Sentence, p. 25 (docket no. 341); Government Memorandum in Support of Motion for Entry of Order, Attachment A (docket no. 345).

Defendant, in this proceeding, has submitted no certified appraisal, no audited figures, no capitalization of an income stream, no offer of a comparable sale, and no

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[4] The Eighth Circuit granted leave for this Court to reopen the record on remand. *Alexander*, 32 F.3d at 1237. Based upon the ample trial record before the Court, and the paucity of evidence proffered by the defendant, particularly in light of his burden to establish his initial holdings, the Court sees no need to take additional evidence.

specific asset listing or evaluation. The defendant has simply offered numbers. His trial testimony was facile in the extreme, and his declarations in support of this Court's proportionality review have been no more credible. *See* Sentencing Transcript, p. 71 (docket no. 200).

The Court has been instructed that it must consider two factors when making the proportionality analysis: (1) the extent and duration of defendant's criminal activities; and (2) the "quantum" of property forfeited, as compared to the extent of the illegal activity. *Id.* at 1236.

The defendant has, certainly, surrendered his interest in the 10 parcels of real estate found to be forfeit by the jury and his interest in the wholesale and retail business which was an instrument of the illegal RICO enterprise. He also forfeited nearly $9 million as proceeds from criminal activity. But, as set forth above, these losses are not subject to an excessive fines analysis, because separation from proceeds of criminal activity is not punishment. *Alexander,* 32 F.3d at 1236. Therefore, if the defendant is to prevail, he must focus on the loss of his personally held real property and business interests. These are the subjects of the excessive fines analysis.

The defendant argued to the Supreme Court that his business was worth almost $25 million. *See Alexander v. United States,* Petitioner's Brief, 1992 WL 511951 at ** 1, 10, 40, and 48. But he made a declaration in his Chapter 7 bankruptcy schedule, under penalty of perjury, that the value of his property was approximately $2 million. *See* Government's Memorandum in Support of Motion for Entry of Order, Attachment A. Such an inconsistency is in full accord with his testimony at trial. *See* Sentencing

Transcript, pp. 71-72 (docket no. 200). The Court finds Mr. Alexander's unsupported evaluation of his assets is unworthy of belief.

C. Defendant's Efforts to Frustrate Valuation.

Defendant argues he should be relieved of his burden to show gross disproportionality because the United States Marshal [sic] made no detailed inventory of the business's videos, magazines, and novelty items prior to their destruction. The argument is unavailing.

Defendant seeks to turn his own obligation to establish the original value of his property into the obligation of the United States. There are a number of reasons why this effort to evade the Eighth Circuit's ruling must fail. First, of course, Mr. Alexander's business was a monument to purposeful avoidance of meaningful record keeping. This failure to keep records has frustrated efforts to establish any defensible business or asset evaluation. The following examples illustrate, but are not an exhaustive listing of, the means defendant used to avoid meaningful record keeping:

- Defendant failed to personally file tax returns for years.

- Defendant filed tax returns for nominee-employees declaring they earned millions of dollars, when in fact, their earnings were between $15,000 and $20,000 annually. The sums "earned" by these employees were kept by the defendant.

- Trial testimony showed that many of the defendant's shops had peep shows in which a multi-quarter

deposit would purchase several minutes of video watching. There was extensive testimony demonstrating that viewers dropped their quarters into unmetered coin devices. These machines were regularly emptied by use of galvanized steel milk buckets. The collected coins were brought, uncounted, to Mr. Alexander. He maintained a coin-counting and rolling device in his personal office and (except for intermittent periods when he was assisted by his brother) handled this operation himself. Mr. Alexander kept no regular record of the amounts collected, except for a personal monthly declaration.

• The disposition of these coins is instructive. Ms. Gail Studer, a bank teller at First Bank in St. Anthony Falls, Minnesota, testified that defendant regularly made cash deposits of $5,000.00 to $12,000.00. These deposits were made under an exemption from Currency Transaction Reporting ("CTR") requirement. At this time, there was an exemption list from CTR requirements for regular cash customers. Mr. Alexander was on that list.

A substantial portion of the defendant's cash deposits were in the form of bagged quarters. These deposits were divided among five or six business and personal accounts, and defendant would often retain large amounts of cash in $50 and $100 denominations. *See* Trial Transcript, Vol. XVI, pp. 16-25 (docket no. 217).

Ms. Studer further testified that First Bank would contact Mr. Alexander, rather than the Federal Reserve Bank, when it needed quarters. On these occasions, defendant would use a hand cart to bring in $500 dollar bags of quarters – $4,000 to $5,000 per visit – to be

converted to cash to satisfy First Bank's needs. *Id.* at 31-32.

Under these circumstances, the Court easily determined that there were vast unreported sums of money. The sentence reflected the Court's belief that the defendant had secreted large numbers of dollars almost daily over a period of years. *See e.g.* Sentencing Transcript, pp. 69-70 (docket no. 200). The exact sum is incapable of calculation as a result of defendant's machinations.

If one cannot calculate a defendant's base holdings, it is mathematically impossible to determine the proportion of any fines to assets. In the absence of a proportion, it is impossible to determine if a sum is disproportionate.

Based on this record, an acceptance of the defendant's argument that the forfeiture was grossly disproportionate would turn the law on its head. Such a rule would reward one who purposefully fails to keep reliable records and insulate such a person from a risk of forfeiture. The Court declines the suggestion.

Second, the court well-recalls that between the time of Mr. Alexander's conviction and the seizure of his assets, he requested, and was granted, continuing control of his business and his assets. *See United States v. Alexander*, 4-89-CR-85(01), Order, slip op. at 6-7 (D. Minn. June 1, 1990) (docket no. 151); *Id.*, Order, slip op. at 2 (D. Minn. August 10, 1990) (docket no. 173); Sentencing Transcript, p. 69 (docket no. 200). During this time, Mr. Alexander secreted assets, attempted bulk sales, and engaged in what can only be called a series of shenanigans designed

to obstruct this Court's orderly processes and enrich himself before the Marshal seized his inventory and equipment. *See United States v. Alexander*, 4-89-CR-85(01), Transcript of August 10, 1990, Contempt Hearing, pp. 17-25, 34-37, and 71-73 (docket no. 201); *Id.*, Order, slip op. at 1-2 (D. Minn. Aug. 10, 1990) (docket no. 173). The Court found that defendant willfully dissipated assets belonging to the United States and violated this Court's orders. As a result, the Court ordered forfeiture of a $50,000.00 waste bond. *See United States v. Alexander*, 4-89-CR-85(01), Order, slip op. at 2-3 (docket no. 304).

On this demonstrated record of defendant's own actions, it is not for Mr. Alexander to complain that the Marshal failed to inventory his holdings. Accordingly, the Court determines the United States Marshal had no duty to make an inventory and rejects defendant's argument that he should be relieved of his burden to show gross disproportionality.

Third, the Court rejects defendant's repeated argument that he was only convicted of selling a small amount of obscene material, and any large forfeiture is *per se* disproportionate to his crime. Defendant offered this argument before both the Supreme Court and Eighth Circuit. Each court rejected it. *Alexander*, ___ U.S. at ___, 113 S.Ct. at 2776; *Alexander*, 32 F.3d at 1236.

Fourth, the Court has considered the relationship between the forfeiture and the sentence. *Alexander*, 32 F.3d at 1237. According to the government, defendant faced maximum consecutive sentences aggregating 171 years and statutory fines totaling $6,400,000.00. The imposed sentence was 72 months imprisonment, a

$100,000.00 fine, $950.00 in special assessments, and costs of prosecution, imprisonment, and supervision. The Court specifically declined to impose a larger fine because of the RICO forfeiture. *See* Sentencing Transcript, pp. 41-43 and 75 (docket no. 200); *United States v. Alexander*, 4-89-CR-85(01), Statement of Reasons, slip op. at 10 (D. Minn. Aug. 7, 1990) (docket no. 172).

The Court finds the imposed sentence is condign [sic].

III. Conclusion

The Court determines that defendant has failed to make any showing that the imposed forfeiture was grossly disproportionate to his criminal activity. Based on the files, records, and proceedings herein, IT IS ORDERED that:

1. Defendant's motion to mitigate his sentence is denied.

2. The Court affirms its prior sentence.

Dated: March 20th, 1996

/s/ James M. Rosenbaum
JAMES M. ROSENBAUM
United States District Judge

APPENDIX C

UNITED STATES of America,
Plaintiff-Appellee,

v.

Ferris ALEXANDER,
Defendant-Appellant.

No. 90-5417.

United States Court of Appeals,
Eighth Circuit.

Submitted March 9, 1994.

Decided July 12, 1994.

Defendant was convicted in the United States District Court for the District of Minnesota, James M. Rosenbaum, J., of tax and obscenity offenses and violations of Racketeer Influenced and Corrupt Organizations Act (RICO), and he appealed. The Court of Appeals, 943 F.2d 825, affirmed, and certiorari was granted. The Supreme Court, 509 U.S. 544, 113 S.Ct. 2766, 125 L.Ed.2d 441, vacated and remanded. On remand, the Court of Appeals, John R. Gibson, Senior Circuit Judge, held that case had to be remanded for further findings of fact and conclusions of law on issue of whether RICO forfeiture order violated Eighth Amendment's excessive fines clause.

Remanded.

John H. Weston, Beverly Hills, CA, argued (G. Randall Garrou was with him on the brief), for appellant.

Paul A. Murphy, Minneapolis, MN, argued (Mary E. Carlson, on the brief), for appellee.

Before WOLLMAN, Circuit Judge, FLOYD R. GIBSON and JOHN R. GIBSON, Senior Circuit Judges.

JOHN R. GIBSON, Senior Circuit Judge.

Ferris Alexander's appeal comes before us again on remand from the United States Supreme Court to analyze, under the Eighth Amendment's prohibition of excessive fines, the forfeiture of Alexander's property pursuant to the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1963(a)(2)(A) and (D), § 1963(a)(1), (3). After briefing, oral argument, and careful study once again of the district court's forfeiture order, we consider it appropriate to remand to the district court for further proceedings.

In our earlier opinion in this case we affirmed both Alexander's conviction and the district court's forfeiture order brought under RICO, *see Alexander v. Thornburgh*, 943 F.2d 825, 827 (8th Cir.1991). We rejected Alexander's arguments that the forfeiture provisions contained in 18 U.S.C. § 1962 unconstitutionally criminalize nonobscene expressive material and violate the First Amendment. *Id.* at 832. We also rejected arguments that the forfeiture violated the cruel and unusual punishment and excessive fines clauses of the Constitution. *Id.* at 835-36.

In the Supreme Court, Alexander argued first that the forfeiture was a prior restraint on speech rather than a permissible criminal punishment, and was constitutionally overbroad because it was not limited solely to obscene materials and the proceeds from the sale of such materials. *Alexander v. United States*, 509 U.S. 544, ___, ___, 113 S.Ct. 2766, 2770, 2774, 125 L.Ed.2d 441 (1993). The Supreme Court held that this court had lumped together

the cruel and unusual punishment and excessive fines arguments, with the result that this court had not adequately considered whether the forfeiture violated the excessive fines clause. *Id.* at ___-___, 113 S.Ct. at 2775-76. The Court remanded the case with directions that we analyze the forfeiture under the excessive fines clause. *Id.* at ___, 113 S.Ct. at 2776. This statement of the Supreme Court is instructive:

> It is somewhat misleading, we think, to characterize the racketeering crimes for which petitioner was convicted as involving just a few materials ultimately found to be obscene. Petitioner was convicted of creating and managing what the District Court described as "an enormous racketeering enterprise." It is in the light of the extensive criminal activities which petitioner apparently conducted through this racketeering enterprise over a substantial period of time that the question of whether or not the forfeiture was "excessive" must be considered.

Id. (internal citations omitted).

The parties now dispute whether a remand to the district court is necessary, and thus, we briefly summarize the history of the forfeiture proceedings in the district court. Following Alexander's convictions, the district court submitted a portion of the forfeiture issue to the jury. After hearing additional evidence, the jury concluded that ten interests in commercial property and interests in businesses (wholesale business, bookstores, and theaters) owned or controlled by Alexander were forfeitable under 18 U.S.C. § 1963(a)(2) and that four pieces of commercial real estate were not forfeitable. The

district court then held a second phase of forfeiture proceedings. In addition to relying on the testimony and exhibits introduced at trial, the government admitted some forty additional magazines and over 400 additional videos as further evidence of the extent of the racketeering activity and the relationship between the enterprise and the property and proceeds to be forfeited. Alexander did not offer additional evidence during this second phase of the bifurcated forfeiture proceeding.

The district court entered an order and judgment of forfeiture on August 6, 1990, and filed another order on August 13, 1990, detailing the court's reasons for the forfeiture. After affirming the jury verdict of forfeiture, the district court declared the ten commercial properties forfeited to the United States under 18 U.S.C. § 1963(a)(2). *United States v. Alexander*, No. 4-89-85, slip op. at 4-6, 1990 WL 117882 (D.Minn. Aug. 13, 1990). The court refused to order forfeiture of the four other commercial properties the jury determined should not be forfeited, rejecting the government's argument that they could be forfeited under section 1963(a)(1) or (a)(3). *Id.* at 5-6.

The district court then ordered personal property, equipment, and inventory forfeitable under either section 1963(a)(1) or (a)(3). *Id.* at 6. The court first found that the evidence at trial and in the forfeiture hearing established that Alexander acquired or maintained these items as part of the racketeering activity, and that much of the property was undoubtedly derived from proceeds of the ongoing enterprise. *Id.* at 6-7. The court reasoned that the personal property (including videocassette recorders, projectors, and furniture), as well as inventory and office

equipment, permitted Alexander to carry on the racketeering activity. *Id.* at 7. With respect to the inventory of videos and magazines held forfeitable, the court stated:

> A cursory review of those videos and magazines supplied by the government reveals that defendant acquired and distributed scores of materials which were similar in nature to those declared obscene. The Court has little doubt the inventory of videos and magazines held at the various properties previously determined forfeitable were part and parcel of defendant's racketeering schemes.

Id. at 7.

The court also ordered forfeiture of three motor vehicles, concluding that they were maintained by the activities of the RICO enterprise and purchased for use in the distribution of various materials to the business properties. *Id.* at 7-8.

Finally, the court ordered the forfeiture of all bank accounts, all funds credited to and traceable from the accounts, safe deposit boxes, and $8,910,548.10 in monies acquired, maintained, or constituting proceeds obtained from the racketeering activity for the years 1985 through 1988. *Id.* at 8-11. In considering the forfeiture of these funds, the court confronted the "serious question of the relationship between the dollars generated in the sale or distribution of the videos and magazines declared obscene, and that portion of defendant's enterprise which were not obscene." *Id.* at 8-9. The court acknowledged: "[T]here is little chance that the sale of these few videos and magazines could generate such massive income to the enterprise," and questioned whether the jury verdict

finding only a small number of materials to be obscene could support such a vast forfeiture. *Id.* at 9. Nevertheless, the court held that the law and the facts of the case supported the forfeiture. *Id.* at 9. Although the district court made clear that it did not spend the 450-600 hours which would have been required to review each of the additional 400 videos submitted in the second phase of the forfeiture proceedings, the court conducted a general review of the videos, concluding that there was "little doubt some of it is of the same quality as that declared obscene." *Id.* at 8. The court also observed that RICO forfeitures were *in personam* rather than *in rem* punishment, and that an *in personam* punishment deprives the defendant of all profits and proceeds acquired through the racketeering activity, " 'regardless of whether those assets are themselves "tainted" by use in connection with the illicit activity.' " *Id.* at 9-10 (quoting *United States v. Ginsburg*, 773 F.2d 798, 801 (7th Cir.1985), *cert. denied*, 475 U.S. 1011, 106 S.Ct. 1186, 89 L.Ed.2d 302 (1986)). While acknowledging that the determination of the amount of profits and proceeds from the racketeering activity cannot be precise, the court concluded that "gross profits are at least one acceptable measure of proceeds." *Id.* at 11. The court stated: "[T]he appropriate nexus between the proceeds and the illegal activity may be demonstrated by the jury's verdict of guilt, particularly if the proceeds are addressed in the indictment. In addition, the Court may consider all the evidence in the case, even circumstantial evidence to determine the amount to be forfeited and the connection between the racketeering activity and the proceeds." *Id.* at 12 (citations omitted).

The court further acknowledged that punishment for a RICO violation should be proportional to the racketeering crime. *Id.* at 12-13. Relying on cases from other circuits, the court stated that "[a] RICO forfeiture penalty 'is keyed to the magnitude of defendant's criminal enterprise.' " *Id.* at 13 (quoting *United States v. Lizza Indus., Inc.*, 775 F.2d 492, 498 (2d Cir.1985), *cert. denied*, 475 U.S. 1082, 106 S.Ct. 1459, 89 L.Ed.2d 716 (1986)). The court observed that the indictment contained the bank accounts and the eight million dollar figure, and that "[t]he proceeds clearly supported the RICO scheme by providing the means and methods of transporting and selling obscene materials." *Id.* at 13. "Underlying those materials which the jury found obscene is that vast support system which made their existence and sale in this state possible." *Id.* The court flatly rejected Alexander's argument that such a vast forfeiture would violate his First Amendment rights, stating that the proceeds were "inextricably tied to the enormous racketeering enterprise, and their connection to arguably protected speech will not save them from the reach of RICO forfeiture." *Id.* at 13-14.

The court entered a judgment ordering forfeiture of: ten items of real estate; interests in some eighteen non-corporate businesses, including inventory, accounts receivable, vehicles, equipment, office furniture, computers, safes, television sets and videocassette recorders; currency and funds in some fifteen bank accounts; inventory and equipment in thirteen other non-corporate businesses, including inventory, equipment and furnishings; certain personal property including eight-millimeter projectors and videocassette recorders; three vehicles; and $8,910,548.10 constituting proceeds which Alexander

obtained directly or indirectly from racketeering activities for the years 1985 through 1988. *United States v. Alexander*, No. 4-89-85, Order and Judgment of Forfeiture, slip op. at 2-12, 1990 WL 117882 (D.Minn. Aug. 6, 1990).

I.

We must first decide whether we can analyze the excessive fines issue on the record before us or whether a remand to the district court is necessary. Alexander contends that we must return this case to the district court for development of a further record, and argues that the excessive fines issue cannot be resolved without a determination by the district court of the amount of assets forfeited to the government and the extent of unlawful activities.

The government, on the other hand, argues that the district court fully considered the forfeitures under the Eighth Amendment in its forfeiture orders, and asks that we conclude on the record before us that the forfeitures were not grossly disproportionate under the excessive fines clause. The government further contends that Alexander had ample opportunity to develop the record on his Eighth Amendment challenge to the scope of forfeiture, and that Alexander failed to meet his burden of establishing its excessiveness in the first instance. The government asks this court to formulate a constitutional standard to analyze forfeitures under the excessive fines clause. Finally, the government argues that if we remand the case to the district court, we should vacate the entire sentence and remand for resentencing since the forfeiture

was considered by the district court as part of Alexander's entire sentence.

In the district court's order of August 13, 1990, the court carefully detailed its reasoning for ordering forfeiture. On several occasions the court used the words "portion" and "proportional," and recognized the difficult question Alexander presented regarding the forfeitability of proceeds generated from the sale of nonobscene videos and magazines. Nevertheless, we read this order as establishing the basis for the extent of the forfeiture ordered, not as a proportionality analysis required by the Eighth Amendment. The court focused on the scope and income of the racketeering enterprise, not on the excessive fines clause of the Eighth Amendment. Indeed, the court's order does not outline the nature of the excessive fines argument that Alexander may or may not have made in the forfeiture proceedings.[1]

Suffice it to say, the painstaking care demonstrated by the district court in its forfeiture order does not reveal that the district court conducted a proportionality analysis under the excessive fines clause. While we can infer that the district court would not have ordered forfeiture to the extent that it did if it concluded that there was

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[1] We are unsure whether and to what extent Alexander presented his excessive fines argument to the district court. Alexander presented a general Eighth Amendment argument to this court on appeal mentioning the Eighth Amendment prohibition against cruel and unusual punishments and excessive fines. The thrust of his argument was that the income from the racketeering activity amounted to only an infinitesimal percentage of his legitimate income and the combined effect of the forfeiture, fine, and prison sentence was "amazingly unfair."

constitutional disproportionality under the excessive fines clause, the district court did not explicitly analyze the question.

Because the factual issues involved in the excessive fines analysis must be gleaned from a record following Alexander's four-month trial, as well as the separate bifurcated forfeiture proceedings and extensive documentary records, we conclude that the district court, rather than this court, should analyze the issue first. Many factors necessary to determining whether there is an excessive fine are of a factual nature. While the record contains many findings that are critical to this issue, we are not satisfied that in facing the excessive fines issue, the district court would not have made further findings or conducted additional analysis.

Accordingly, we remand to the district court for further findings of fact and conclusions of law on the excessive fines issue.

II.

It is appropriate that we set forth some principles to guide the district court on remand as it considers the excessive fines issue. First, we must consider the procedure the district court should utilize in considering an excessive fines issue. The court must, of necessity, base a criminal RICO forfeiture upon either appropriate findings by the jury or its own factual findings and analysis. This is what the district court has done in its forfeiture order in this case. Other circuits have been unanimous in holding that the defendant has the initial burden of making a prima facie showing of "gross disproportionality." *United*

States v. Sarbello, 985 F.2d 716, 724 (3d Cir.1993); *United States v. Bucuvalas*, 970 F.2d 937, 946 (1st Cir.1992), *cert. denied*, 507 U.S. 959, 113 S.Ct. 1382, 122 L.Ed.2d 758 (1993); *United States v. 6250 Ledge Road*, 943 F.2d 721, 728 (7th Cir.1991); *United States v. Busher*, 817 F.2d 1409, 1415 (9th Cir.1987). *See also United States v. Pryba*, 900 F.2d 748, 757 (4th Cir.) (no proportionality analysis required because defendants failed to proffer required information), *cert. denied*, 498 U.S. 924, 111 S.Ct. 305, 112 L.Ed.2d 258 (1990). As the Third Circuit observed in Sarbello, because section 1963 "mandates *in personam* forfeiture based upon a finding of criminal guilt, . . . the burden of mitigating a draconian forfeiture verdict rests with the defendant." 985 F.2d at 724.

If Alexander satisfies his burden of showing gross disproportionality, the court must then consider the government's evidence of "just proportionality" and analyze in detail whether there has been a violation of the excessive fines clause. *Id.*

The Supreme Court opinion in Alexander's case pointed to one aspect of this analysis when it rejected Alexander's argument that the forfeiture of the entire business was an excessive penalty on the basis of the few materials the jury ultimately decided were obscene. 509 U.S. at ___, 113 S.Ct. at 2776. The Court pointed to the district court's finding of the "enormous racketeering enterprise," and stated: "It is in the light of the extensive criminal activities which petitioner apparently conducted through this racketeering enterprise over a substantial period of time that the question of whether or not the forfeiture was 'excessive' must be considered." *Id.* The

Supreme Court thus directs that the district court consider the extent and duration of Alexander's criminal activities. Certainly, such an inquiry must also consider the gravity of the offense. As we stated above, the district court made abundant findings with respect to these issues.

Alexander and the government differ as to the importance of the value of the property forfeited. The government argues that only the extent of the illegal activity must be considered, while Alexander urges that the value of all items forfeited must be determined. We think it inherent in the inquiry that the court determine both the extent of the criminal activity and the quantum of property forfeited.[2] *See Alexander*, 509 U.S. at ___, 113 S.Ct. at

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[2] Although *Austin v. United States*, 509 U.S. 602, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993), involved a civil forfeiture under 21 U.S.C. § 881(a)(4) and (a)(7), the Supreme Court concluded that a civil forfeiture was subject to the limitation of the excessive fines clause. *Id.* at ___, 113 S.Ct. at 2803-05. The Court declined, however, to establish a multifactor test for making such a determination. *Id.* at ___, 113 S.Ct. at 2812. Justice Scalia's separate concurring opinion argues that when the offense of conviction is not relevant to the forfeiture, the single question is "not *how much* the confiscated property is worth, but *whether* the confiscated property had a close enough relationship to the offense." *Id.* at ___, 113 S.Ct. at 2815 (emphasis in original). The Court noted Justice Scalia's suggestion "that the sole measure of an *in rem* forfeiture's excessiveness is the relationship between the forfeited property and the offense," and did "not rule out the possibility that the connection between the property and the offense may be relevant." *Id.* at ___ n. 15, 113 S.Ct. at 2812 n. 15. The Court did not, however, limit the court of appeals from considering other factors to determine whether the forfeiture of the property was excessive. *Id.*

2776; *Austin v. United States*, 509 U.S. 602, ___-___, 113 S.Ct. 2801, 2814-15, 125 L.Ed.2d 488 (1993) (Scalia J., concurring).

It is also evident that other courts have recognized the distinction in the RICO forfeiture statutes between the proceeds from the racketeering activity and property which facilitates or affords a defendant with a source of influence over the illegal enterprise. *See, e.g., Sarbello*, 985 F.2d at 723; *United States v. Walsh*, 700 F.2d 846, 857 (2d Cir.), *cert. denied*, 464 U.S. 825, 104 S.Ct. 96, 78 L.Ed.2d 102 (1983). Forfeiture of proceeds cannot be considered punishment, and thus, subject to the excessive fines clause, as it simply parts the owner from the fruits of the criminal activity. In *Austin*, and in discussing the context of the forfeiture of property that facilitated the criminal activity, Justice Blackmun stated: "[A] fine that serves purely remedial purposes cannot be considered 'excessive' in any event." 509 U.S. at ___ n. 14, 113 S.Ct. at 2812 n. 14.

In considering whether a forfeiture is grossly disproportionate, and thus, an excessive fine, we must analyze the specific facts involved in each case. Judge Mansmann's thoughtful opinion in Sarbello articulated other areas of inquiry:

> We note that a district court's proportionality analysis, while it will not in every case be extensive or encompass the three factors set forth in *Solem* [*v. Helm*, 463 U.S. 277 [103 S.Ct. 3001, 77 L.Ed.2d 637] (1983),] must necessarily accommodate the facts of the case and weigh the seriousness of the offense, including the moral gravity of the crime measured in terms of the magnitude and nature of its harmful reach, against the

> severity of the criminal sanction. Other helpful inquiries might include an assessment of the personal benefit reaped by the defendant, the defendant's motive and culpability and, of course, the extent that the defendant's interest and the enterprise itself are tainted by criminal conduct. *See, e.g., United States v. Busher,* 817 F.2d [1409] at 1415 [(9th Cir.1987)] (where dollar amount of fraudulent conduct constituted a small fraction of the legitimate business of the enterprise, the court found a potential *prima facie* showing of excessive forfeiture). The language of the [E]ighth [A]mendment demands that a constitutionally cognizable disproportionality reach such a level of excessiveness that in justice the punishment is more criminal than the crime.

985 F.2d at 724.

Our recital of these factors to be considered is not complete or exhaustive. The issue is fact-bound, and the district court's greater familiarity with the record may suggest other avenues for analysis. A review of the excessive fine issue must be based upon the analysis and record finally developed by the district court.

On remand, the district court should first determine whether Alexander has met his burden of proof of establishing a prima facie showing of a grossly disproportionate forfeiture. The briefs before us dispute the value of the property forfeited, other than the specific forfeiture of bank accounts and proceeds in the amount of $8,910,548.10. The district court must determine the total value of the property forfeited.

We also observe that the district court considered the relationship in this case between the forfeiture ordered and the sentences imposed.[3] The district court certainly should consider the sentences imposed in determining whether the forfeiture has been grossly disproportionate.

We have no doubt that the district court can make the necessary findings to analyze the excessive fines issue based upon the abundant record before it. If it determines that additional evidence must be taken to resolve this issue, it may, in its discretion, conduct any further necessary proceedings.

This court will retain jurisdiction of this case and further consider the issues when the district court files its further order, which will be directed to this panel for disposition.

Accordingly, we remand this case to the district court.

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[3] The separate sentencing order of the district court explicitly rejected the government's suggestion of a much higher fine than that imposed, stating that "the government's interests are well served by the forfeiture provisions of RICO and this Court's implementation of those sections." *United States v. Alexander*, No. 4-89-95, slip op. at 6 (D.Minn. Aug. 8, 1990).

APPENDIX D

UNITED STATES DISTRICT COURT

District of Minnesota

UNITED STATES OF AMERICA V. FERRIS J. ALEXANDER, Sr.	**JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT** Case Number 4-89-85(1)
(Name of Defendant)	Deborah Ellis and Robert E. Smith Defendant's Attorney

THE DEFENDANT:

___ pleaded guilty to count(s)_____

_X_ was found guilty on count(s) 1-9, 20-25, 28, 30, 31, 33-37, 39, 41 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)

SEE ATTACHED

The defendant is sentenced as provided in pages 2 through _____ of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

_X_ The defendant has been found not guilty on count(s) 10-19, 26, 27, 29, 32, 38, 40, and is discharged as to such count(s).

___ Count(s) _____ (is)(are) dismissed on the motion of the United States.

X The mandatory special assessment is included in the portion of this Judgment that imposes a fine.

___ It is ordered that the defendant shall pay to the United States a special assessment of $ _____, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's
Soc. Sec. Number:
468-14-0838

Defendant's
mailing address:
4608 Ellerdale Road

Minnetonka, Minnesota
55345

Defendant's
residence address:
Same

August 6, 1990
Date of Imposition of
Sentence

/s/ James M. Rosenbaum
Signature of
Judicial Officer

James M. Rosenbaum
U.S. District Judge
Name & Title of
Judicial Officer

Aug 13th, 1990
Date

Title and Section	Nature of Offense	Count Numbers
18 U.S.C. § 371	Conspiracy to Defraud IRS	1
26 U.S.C. § 7206(1)	Filing False Tax Returns	2, 3
18 U.S.C. § 1962(d)	Conspiracy to Violate RICO	4
18 U.S.C. § 1962(a)	Investing Racketeering Proceeds	5
18 U.S.C. § 1962(c)	Conducting RICO Enterprise	6
18 U.S.C. § 1465	Interstate Transportation of Obscene Material for Sale	7, 8, 9, 20, 21, 22, 23, 24, 25, 28, 30, 31
18 U.S.C. § 1466	Sale of Obscene Material	33, 34, 35, 36, 37, 39
42 U.S.C. § 408(g)(2)	Use of False Social Security No.	41

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 72 months as to Counts 4, 5, and 6, said sentences to run concurrently; 60 months as to Counts 1, 7, 8, 9, 24, 25, 33, 34, 35, 36, 37, and 39, said sentences to

run concurrently with each other and concurrently with the sentences imposed on Counts 4, 5, and 6; 36 months (three years) as to Counts 2, 3, 20, 21, 22, 23, 28, 30, 31, and 41, said sentences to run concurrently with each other and concurrently with the sentences imposed on Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 24, 25, 33, 34, 35, 36, 37, and 39.

X The Court makes the following recommendations to the Bureau of Prisons:

The federal facility at Rochester, Minnesota, as the place for service of sentence.

___ The defendant is remanded to the custody of the United States Marshal.

___ The defendant shall surrender to the United States Marshal for this district,

___ at _____ a.m. / p.m. on _____ .

___ as notified by the Marshal.

X The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

___ before 2 p.m. on August 28, 1990.

___ as notified by the United States Marshal.

___ as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at

_____, with a certified copy of this Judgment.

_____

United States Marshal

By _____

Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of three years as to Counts 1, 4, 5, 6, 7, 8, 9, 24, 25, 33, 34, 35, 36, 37, and 39, said.

Sentences of supervised release to run concurrently.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and will comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be

a condition of supervised release that defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

The defendant shall not possess any firearms or dangerous weapons.

The defendant shall submit to periodic drug testing at the direction of the probation office.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another Federal, state or local crime;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer;

3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall support his or her dependents and meet other family responsibilities;

6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

FINE WITH SPECIAL ASSESSMENT

The defendant shall pay to the United States the sum of $ 100,950 , consisting of a fine of $ 100,000 and a special assessment of $ 950 .

X These amounts are the totals of the fines and assessments imposed on individual counts, as follows:

$50 special assessment, per count, as to Counts 1, 4, 5, 6, 7, 8, 9, 20, 23, 24, 25, 31, 33, 34, 35, 36, 37, 39, and 41.

$100,000 aggregate fine as to Counts 1, 4, 5, 6, 7, 8, 9, 24, 25, 33, 34, 35, 36, 37, and 39.

This sum shall be paid X immediately.
___ as follows:

___ The Court has determined that the defendant does not have the ability to pay interest. It is ordered that:

___ The interest requirement is waived.

___ The interest requirement is modified as follows:

RESTITUTION, FORFEITURE, OR OTHER PROVISIONS OF THE JUDGMENT

IS ADJUDGED AND ORDERED THAT:

As to Courts 1, 4, 5, 6, 7, 8, 9, 24, 25, 33, 34, 35, 36, 37, and 39, defendant shall pay the costs of his incarceration and supervised release. These amounts shall be: $1,415.56 per month for the period of incarceration, and $96.66 per month for the period of supervised release.

Defendant shall forfeit property and proceeds and pay costs of prosecution as set forth in this Court's order dated August 6, 1990. The August 6, 1990, order is hereby incorporated into this judgment.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
Criminal No. 4-89-85

UNITED STATES OF AMERICA, Plaintiff, v. FERRIS J. ALEXANDER, SR., and WANDA MAGNUSON, Defendants.	)	ORDER AND JUDGMENT OF FORFEITURE Filed Aug. 6, 1990

WHEREAS, in the Indictment in the above-entitled case, plaintiff, the United States of America, sought the forfeiture of certain properties of defendant Ferris J. Alexander, Sr., (hereinafter referred to as the "defendant") pursuant to 18 U.S.C. § 1963;

AND WHEREAS, on May 23, 1990, a jury found the defendant guilty under 18 U.S.C. § 1962(a), (c) and (d);

AND WHEREAS, on May 25, 1990, the same jury found that the defendant has certain rights and interests in properties listed below which interests were used by the defendant to establish, operate, control, conduct or participate in the conduct of an enterprise and which property rights afforded him a source of influence over the enterprise pursuant to 18 U.S.C. § 1963(a)(2);

AND WHEREAS, on June 25, 1990 the United States submitted its claim, to the Court, of forfeiture under 18 U.S.C. § 1963(a)(1) and (a)(3), and this Court having found that the defendant has acquired and maintained interests in properties listed below in violation of Section

1962 and that said properties constitute or are derived from, proceeds which the defendant obtained, directly or indirectly, from racketeering activity in violation of Section 1962;

NOW THEREFORE IT IS ORDERED that the defendant's interests and rights in and to the following properties are forfeited to the United States of America, effective as of the date of this order:

1. Real property, including any buildings, improvements, appurtenances and fixtures thereof located at 614-616 Hennepin Avenue, Minneapolis, legally described as all of Lot 9, Block 3, Hoag and Bell's Addition, Hennepin County, Minnesota, and commonly known as the American Empress Theater and Bookstore, pursuant to 18 U.S.C. § 1963(a)(1); (a)(2)(D); and (a)(3).

2. Real property, including any buildings, improvements, appurtenances and fixtures thereof located at 311-315 East Lake Street, Minneapolis, legally described as Lots 38 through 41 inclusive, State Addition, Hennepin County, Minnesota, and commonly known as the AB Distributors, pursuant to 18 U.S.C. § 1963(a)(1); (a)(D); and (a)(3).

3. Real property, including any buildings, improvements, appurtenances and fixture thereof located at 739-743 East Lake Street, Minneapolis, legally described as

> Lots One (1), Two (2), Three (3) and the North ten (10) feet of Lot Four (4) Block One (1) Chicago-Lake Park Addition to Minneapolis, except all that part of Lots One (1), Two (2), Three (3) and Four (4), Block One (1), Chicago-Lake Park

Addition to Minneapolis, described as follows: Beginning at the Northwest corner of said Lot One (1); thence South along the West line-of Lots One (1), Two (2), Three (3) and Four (4) to a point ten (10) feet South of the Northwest corner of said Lot Four (4); thence East parallel with the North line of said Lot four (4), fifty-five (55) feet; thence North parallel with the West line of said Lots Four (4), Three (3) and Two (2), a distance of seventy-nine and sixty-five hundredths (79.65) feet; thence West parallel with the North line of said Lot Two (2), a distance of four and fifty-six hundredths (4.56) feet; thence North parallel with the West line of said Lot Two (2), a distance of one (1) foot; thence West parallel with the North line of said Lot Two (2), a distance of five and seventy-three hundredths (5.73) feet; thence North parallel with the West line of said lots Two (2) and One (1) to a point on the North line of said Lot One (1), said point being forty-four and seventy-one hundredths (44.71) feet East of the point of beginning; thence West along the North line of said Lot One (1) to the point of beginning, and excepting also from the land conveyed hereby, the South five (5) feet of the North ten (10) feet of that part of Lot Four (4), lying East of the West fifty-five (55) thereof.

Also the south thirty (30) feet, front and rear, of lot 4, and the north Ten (10) feet, front and rear, of Lot 5, all in Block 1, Chicago Lake Park Addition to Minneapolis,

and both according to the recorded plat thereof,

all in Hennepin County, Minnesota, and commonly known as the Chicago-Lake Bookstore, pursuant to 18 U.S.C. § 1963 (a)(1); (a)(2)(D); and (a)(3).

4. Real property, including any buildings, improvements, appurtenances and fixtures thereof located at 2936-2938 Lyndale Avenue South, Minneapolis, legally described as Lot 10, Auditor's Subdivision No. 187, the four corners of the tract are worked by judicial landmarks according to the plot thereof, Hennepin County, Minnesota, commonly known as the Nicola Bookstore, pursuant to 18 U.S.C. § 1963(a)(1); (a)(2)(D); and (a)(3).

5. Real property, including any buildings, improvements, appurtenances and fixtures thereof located at 315 South Broadway, Rochester, legally described as the Middle One-third of Lot 3, Block 10, Moe and Old's Addition to Rochester, Olmstead County, Minnesota, commonly known as Joey's Adult Bookstore, pursuant to 18 U.S.C. § 1963(a)(1); (a)(2)(D); and (a)(3).

6. Real property, including any buildings, improvements, appurtenances and fixtures therof located at 319-323 South Broadway, Rochester, legally described as the North One-third of Lot 2, Block 10, the North One-half of the South two-thirds of Lot 2, Block 10; and the South One-third of Lot 2, Block 10, Moe and Old's Addition to Rochester, Olmstead County, Minnesota, commonly known as the Broadway Book II, pursuant to 18 U.S.C. § 1963(a)(1); (a)(2)(D); and (a)(3).

7. Real property, including any buildings, improvements, appurtenances and fixtures thereof located at 324-328 ½ South Broadway, Rochester, legally described as:

Commencing on the East line of Broadway Street, in the City of Rochester, 65 1/2 feet North of the north line of College Street, in center of brick wall, there located and running East in center of said wall about 84 feet to a line hereafter described; thence Northerly on that line about 23 feet to a point 88 1/2 feet North of the North line of College Street, thence West along the center of party wall about 88 2/3 feet to the East line of Broadway Street; thence South to place of beginning, East line above referred to commencing on the North line of College Street 70 feet East of the East line of Broadway Street and running to a point on the South line of Third Street 140 feet East of the East line of Broadway Street. Said College Street is now known as Fourth Street S.E. Subject to party walls and subject to the real estate taxes due and payable in 1971. Together with

The North forty-three and one-half (43 1/2) feet of the South Sixty-five and one-half (65 1/2) feet of that part of the Mill Reservation of Moe and Olds Addition to the town, now city, of Rochester extending east from the east line of Broadway Street south to a line drawn from a point on the south line of Third Street Southeast one hundred forty (140) feet east of the east line of said Broadway Street South to a point in the north line of Fourth Street Southeast seventy (70) feet east of the east line of said Broadway Street South, subject to and together with party wall rights in the party walls of the buildings on the south and north lines of said lands, all in Olmstead County, State of Minnesota.

said property is commonly known as the Broadway Book I, pursuant to 18 U.S.C. § 1963(a)(1); (a)(2)(D); and (a)(3).

8. Real property, including any buildings, improvements, appurtenances and fixtures thereof located at 227 East Third Street, Winona, legally described as the Westerly 24 feet of the Easterly 46 feet of Lot 1, Block 144, original plat to Winona, located upon and forming a part of government Lot 2, Section 23, Township 107 North, Range 7, West of the Fifth Principal Meridian, Winona County, Minnesota, and commonly known as the Ultimate Bookstore, pursuant to 18 U.S.C. § 1963(a)(1); (a)(2)(D); and (a)(3).

9. Real property, including any buildings, improvements, appurtenances and fixtures thereof located at 621-623 University Avenue West, St. Paul, legally described as Lot 30, Block 1, Syndicate No. 1 Addition, Ramsey County, Minnesota, commonly known as The Flick, pursuant to 18 U.S.C. § 1963(a)(1); (a)(2)(D); and (a)(3).

10. Real property, including any buildings, improvements, appurtenances and fixtures thereof located at 341-347 East Lake Street, Minneapolis, legally described as Lot 24, Lot 25 and Lot 26, State Addition, Hennepin County, Minnesota, and commonly known as the Lake Street Bookstore, pursuant to 18 U.S.C. § 1963 (a)(1); (a)(2)(D); and (a)(3).

11. All interests, holdings, assets and claims in non-corporate businesses known as:

AB Distributors
The Newspaper Club
Kenneth LaLonde Enterprises
LeRoy Wendling
The Superior Street Company
Express Entertainment

United States Video
U.S. Video
United States Video Distributors
Baker Investments
American Book Wholesalers
A.B. Video
A & B Distributors
Bell Investments
American Theater Supply Company
Video Hits
AB Distributing
Magazine and Book Agency

including but not limited to inventory, accounts receivable, business name or names, vehicles, equipment, office furniture, computers, safes, television sets, video cassette recorders, U.S. currency, and all funds credited to the following bank accounts as of May 25, 1990:

a. A bank account held in the name of the Newspaper Club with the Union & Trust Company, Account No. 101084400.

b. A bank account in the name of A.B. Distributors with the First Bank – St. Anthony Falls, Account No. 206-3023-374.

c. A bank account in the name of Broadway Bookstore with the Marquette Bank and Trust, Rochester, Account No. 2389-625.

d. A bank account in the name of U.S. Video with the Marquette Bank and Trust, Rochester, Account No. 2488-925.

e. A bank account in the name of Wabasha Bookstore with the Norwest Bank, Duluth, Account No. 0116-863.

f. A bank account in the name of Ferris J. Alexander with the First Bank Duluth, Account No. 1095-930.

g. A bank account in the name of American Theater Supply and the Gardner Hotel with the Norwest Bank, Duluth, Account No. 116-848.

h. A bank account in the name of Ferris Alexander with the Merchants National Bank of Winona, Account No. 25-873.

i. A bank account in the name of Ferris Alexander, Edward Alexander and/or The American Book Wholesalers with the First Bank – St. Anthony Falls, Account No. 706-2051-334.

j. A bank account in the name of Haista Paska, Inc., d/b/a Video Hits, with the First Bank – St. Anthony Falls, Account No. 206-3027-052.

k. A bank account in the name of A.B. Video with the First Western State Bank, Account No. 44-057.

l. A bank account in the name of United States Video, Inc., and A. B. Distributors with the First State Bank of St. Paul, Account No. 15-05-510.

m. A bank account in the name of Video Hits with the Union Bank & Trust Co., account #101085400).

n. A bank account in the name of Haista Paska, Inc. d/b/a Video Hits with the First Bank – St. Anthony Falls, account #206-3027-052.

o. A bank account in the name of Video Hits with the Merchants National Bank of Winona, account #7-173; pursuant to 18 U.S.C. § 1963(a)(2)(A) and (a)(2)(D).

12. All rights, interests, holdings and claims in a non-corporate business entity known as The Flick, including inventory, equipment and furnishings, pursuant to 18 U.S.C. § 1963(a)(2)(A) and (a)(2)(D).

13. All rights, interests, holdings and claims in a non-corporate business entity known as The Wabasha Bookstore a/k/a The Wabasha Adult Bookstore, including inventory, equipment and furnishings, pursuant to 18 U.S.C. § 1963(a)(2)(A) and (a)(2)(D).

14. All rights, interests, holdings and claims in a non-corporate business entity known as The Lake Street Bookstore, including inventory, equipment and furnishings, pursuant to 18 U.S.C. § 1963(a)(2)(A) and (a)(2)(D).

15. All rights, interests, holdings and claims in a non-corporate business entity known as The Adult Entertainment Center, including inventory, equipment and furnishings, pursuant to 18 U.S.C. § 1963(a)(2)(A) and (a)(2)(D).

16. All rights, interests, holdings and claims in a non-corporate business entity known as the Chicago-Lake Bookstore, including inventory, equipment and furnishings, pursuant to 18 U.S.C. § 1963(a)(2)(A) and (a)(2)(D).

17. All rights, interests, holdings and claims in a non-corporate business entity known as the American Empress Theater and Bookstore a/k/a American Bookstore, including inventory, equipment and furnishings, pursuant to 18 U.S.C. § 1963(a)(2)(A) and (a)(2)(D).

18. All rights, interests, holdings and claims in a non-corporate business entity known as Nicola's Bookstore, including inventory, equipment and furnishings, pursuant to 18 U.S.C. § 1963(a)(2)(A) and (a)(2)(D).

19. All rights, interests, holdings and claims in a non-corporate business entity known as East Hennepin Video Book & Theater, including inventory, equipment and furnishings, pursuant to 18 U.S.C. § 1963(a)(2)(A) and (a)(2)(D).

20. All rights, interests, holdings and claims in a non-corporate business entity known as Broadway Book I, including inventory, equipment and furnishings, pursuant to 18 U.S.C. § 1963(a)(2)(A) and (a)(2)(D).

21. All rights, interests, holdings and claims in a non-corporate business entity known as Broadway Book II, including inventory, equipment and furnishings, pursuant to 18 U.S.C. § 1963(a)(2)(A) and (a)(2)(D).

22. All rights, interests, holdings and claims in a non-corporate business entity known as Joey's Adult Bookstore, including inventory, equipment and furnishings, pursuant to 18 U.S.C. § 1963(a)(2)(A) and (a)(2)(D).

23. All rights, interests, holdings and claims in a non-corporate business entity known as The Ultimate Bookstore, including inventory, equipment and furnishings, pursuant to 18 U.S.C. § 1963(a)(2)(A) and (a)(2)(D).

24. All rights, interests, holdings and claims in a non-corporate business entity known as Video Hits, Winona, including inventory, equipment and furnishings, pursuant to 18 U.S.C. § 1963(a)(2)(A) and (a)(2)(D).

25. The above-mentioned bank accounts (paragraph 15) and all funds credited to the accounts as of the date of this indictment and traceable from the accounts as of the date of and subsequent to the indictment together with the contents of any safe deposit box maintained by and on behalf of Ferris J. Alexander, pursuant to Title 18, United States Code, Section 1963(a)(1) and (a)(3).

26. The following personal property and the proceeds thereof: all 8 mm projectors, television monitors, coin boxes and their contents, safes, video cassette tape players, video cassettes, magazines, other printed material, shelving and display material, chairs, tables, office equipment and furniture, cash registers and their contents, U.S. currency, computers, adding machines, and other inventory, pursuant to 18 U.S.C. § 1963(a)(1) and (a)(3).

27. The following motor vehicles: a 1986 Dodge Van, Vehicle Identification No. 2B7FB13H8GK534657; a 1985 Chevrolet Van, Vehicle Identification No. 2GCEG25H2F416185; a 1976 EZ-Load Trailer, Vehicle Identification No. 61200D; pursuant to 18 U.S.C.§ 1963(a)(1) and (a)(3).

28. All monies acquired, maintained, or constituting proceeds which the defendant obtained, directly or indirectly, from racketeering activity in violation of Section 1962 for the years 1985, 1986, 1987 and 1988 as follows:

(1) 1985 – $2,011,543.58

(2) 1986 – $1,856,820.52

(3) 1987 – $2,484,845.00

(4) 1988 – $2,557,339.00

TOTAL – $8,910,548.10

pursuant to 18 U.S.C. § 1963 (a)(1) and (a)(3).

IT IS FURTHER ORDERED that the Attorney General or his designee is authorized to seize the property, to enter said properties by force if necessary, and dispose of it in accordance with law.

IT IS FURTHER ORDERED that the United States shall publish notice of this Order and its intent to dispose of the property in such manner as the Attorney General may direct. Any person, other than the defendant, asserting a legal interest in the property shall, within thirty (30) days of the final publication of this notice, or his receipt of direct written notice, whichever is earlier, petition the Court for a hearing to adjudicate the validity of his alleged interest in the property. The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

IT IS FURTHER ORDERED that following the Court's disposition of all petitions filed, or if no such petitions are filed following the expiration of the period specified for the filing of such petitions, the United States shall

have their title to the property and may warrant good title to any subsequent purchaser or transferee.

IT IS FURTHER ORDERED that a money judgment shall be entered by the Clerk of Court in favor of the United States and against the defendant, Ferris J. Alexander, in the sum of $8,910,548.10 and that said judgment shall accrue post-judgment interest from the date of this order at the rate allowable by law.

IT IS FURTHER ORDERED that the United States may apply to this Court for entry of a money judgment to the value of any property forfeited to the United States as set forth herein which property is determined to have been transferred, conveyed or liquidated by or on behalf of the defendant, his nominee or assign, at any time subsequent to the commission of any of the acts giving rise to forfeiture under 18 U.S.C. § 1963, or for such other relief as the Court deems appropriate.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: August 6th, 1990

/s/ James M. Rosenbaum
JAMES M. ROSENBAUM, Judge
United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
Criminal No. 4-89-85

United States of America)
) ORDER
v.) (Filed Aug. 13, 1990)
Ferris J. Alexander, et al.)

Jerome Arnold, Paul W. Murphy, Mary E. Carlson, 110 South Fourth Street, #234, Minneapolis, Minnesota, for the United States.

Robert E. Smith, 10 Universal City Plaza, #1600, Universal City, California 91608; and Deborah Ellis, 345 St. Peter Street, St. Paul, Minnesota 55102; for defendant Ferris Alexander.

Michael McGlennon, 333 Third Avenue South, Minneapolis, Minnesota 55415, for defendant Dolores Alexander.

Joseph Friedberg, 250 Second Avenue South, #205, Minneapolis, Minnesota 55401, for defendant Jefferey Alexander.

Dave G. Roston, 250 Second Avenue South, #225, Minneapolis, Minnesota 55401, for defendant Wanda Magnuson.

This matter is before the Court upon the government's motion for forfeiture, pursuant to 18 U.S.C. §1963(a)(1) and (a)(3). The government also requests payment of its costs of prosecution, pursuant to 28 U.S.C. §§1918 and 1920 and 26 U.S.C. §7206. The defendant was tried by a jury which found him guilty of one count of

conspiracy to commit tax fraud in violation of 18 U.S.C. §371, two counts of filing false tax returns in violation of 26 U.S.C. §7206, one count of conspiracy in violation of the Racketeering Influenced Corrupt Organizations Act (RICO), 18 U.S.C. §1962(d), two substantive counts of RICO in violation of 18 U.S.C. §1962(a) and (c), twelve counts of interstate transportation of obscene materials in violation of 18 U.S.C. §1465, six counts of selling obscene materials in violation of 18 U.S.C. §1466, and one count of use of a false social security number in violation of 42 U.S.C. §408(g)(2).

The government moves for forfeiture of the assets and proceeds of the racketeering activity and for the costs of prosecuting the tax, RICO, and individual obscenity counts.

Background

By agreement of the parties, a portion of the forfeiture issue was submitted to the jury following trial on the substantive counts. At the conclusion of this bifurcated proceeding, the jury concluded certain interests in property owned or controlled by the defendant were forfeitable pursuant to 18 U.S.C. §1962(a)(2). That section permits forfeiture of "any (A) interest in; . . . or (D) property or contractual right of any kind affording a source of influence over; any enterprise which the person established." 18 U.S.C. §1963(a)(2)(A),(D).

The jury determined, however, that some interests, claimed by the government to be forfeit, were not subject to forfeiture under part (a)(2). In particular, the jury found that there was no forfeiture interest as part of the

RICO enterprise in the Adult Entertainment Center; Video Hits, Winona; the Wabasha Adult Bookstore; and the East Hennepin Bookstore.

The government now seeks forfeiture of these same properties, pursuant to parts (a)(1) and (a)(3) of section 1963. Part (a)(1) provides, in relevant part, for forfeiture of "any interest the person has acquired or maintained in violation of section 1962." 18 U.S.C. §1963(a)(1). The final forfeiture provision, part (a)(3), contemplates forfeiture of "any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity . . . in violation of section 1962." 18 U.S.C. §1963(a)(3). RICO's forfeiture provisions are mandatory; section 1963 specifically provides the Court "shall order" forfeiture to the United States. 18 U.S.C. §1963(a).

The government also requests forfeiture of $8,910,548.10 as proceeds which it calculates to have been acquired directly or indirectly in violation of 18 U.S.C. §1962. This amount represents proceeds of the racketeering activity for the years 1985 to 1988. This sum, along with the other property which the jury determined forfeitable, was charged in the indictment as being subject to forfeiture. Further, the government asks the Court to seize various bank accounts associated with those entities considered by the jury, various items of personal property, equipment and inventory located on those premises, and at least three motor vehicles used by the criminal enterprise. The government contends these items are forfeitable, pursuant to section 1963(a)(1) and (a)(3).

Finally, the government requests the costs of pursuing its case against defendant. The prosecution has advanced an affidavit showing these costs to be $29,737.84, of which $16,536.24 is allocated to the tax counts. The government suggests imposition of costs on the tax counts is mandatory pursuant to 26 U.S.C. §7206(5), which provides the Court "shall" impose the costs of prosecution. 26 U.S.C. §7206. The government suggests the remainder of the costs should be imposed pursuant to the general costs statute, 28 U.S.C. §§1918 and 1920. While imposition of costs pursuant to these sections is discretionary, the government argues costs are appropriate in light of the scope of defendant's racketeering activities and the manner in which he attempted to evade prosecution.

The facts of this case have been well documented and need not be repeated here. *See United States v. Alexander*, mem. op. at 1-4 (D.Minn. January 24, 1990); *United States v. Alexander*, mem. op. at 1-3 (D.Minn. July 3, 1990). Beyond the evidence produced at trial, the only additional evidence pertinent to these issues is some nine magazines and 400 videos offered by the government, at a post-trial hearing, to demonstrate the extent of defendant's obscenity empire. The government suggests the Court may consider these items as evidence of the relationship between the racketeering enterprise and the property sought to be forfeited, particularly the proceeds.

Analysis

I. Forfeiture

A. Real Property, Interests in Businesses, Personal Property

1. Jury Verdict Pursuant to Section 1963(a)(2)

As an initial matter, the Court affirms the jury verdict of May 25, 1990, declaring real property and interests in property forfeitable, pursuant to section 1963(a)(2). The jury's determinations are supported by evidence beyond a reasonable doubt as to each finding in the special verdict. These properties are, therefore, declared forfeit to the United States, pursuant to 18 U.S.C. §1962(a)(2).

2. Property Declared Non-forfeitable by the Jury

As discussed, the jury, by its special verdict dated May 25, 1990, concluded the real property and interests in the Adult Entertainment Center; Video Hits, Winona; the Wabasha Adult Bookstore; and the East Hennepin Bookstore were not subject to forfeiture, pursuant to section 1962(a)(2). The jury determined defendant held no interest in these properties. The question presented by the government's motion is whether this property may now be forfeited by this Court by way of either section 1963(a)(1) or (a)(3). The Court must answer in the negative.

Section 1962(a)(2) and sections 1962(a)(1) and (a)(3) are clearly distinguishable. Yet, a properly instructed jury specifically concluded that defendant held no interest in

these properties for purposes of forfeiture, pursuant to section 1962(a)(2). As such, the government's conclusion that the properties were derived from or maintained by the RICO enterprise in accordance with sub-parts (a)(1) and (a)(3) cannot be other than suspect. It is well to recall that two co-defendants, including Dolores Alexander, were acquitted on all counts in this prosecution, including the RICO charges. While it cannot be more than conjecture, the jury may well have determined that Dolores Alexander and the other acquitted party held the interests in these properties and operated the properties outside the scope of, and independently from, the racketeering enterprise.[1]

In any case, the Court concludes the evidence produced at trial and afterward was insufficient to support a forfeiture order under any of the section 1963 provisions. Although the government demonstrated some connection between the properties and the racketeering activities, the connection was minimal at best. The proof offered by the government was insufficient to sway the jury as to section 1963(a)(2) and is similarly unpersuasive as to subparts (a)(1) and (a)(3). The property sought by the government which was not determined forfeitable by the jury will not be forfeit by this Court.

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[1] There was absolutely no evidence produced at trial suggesting co-defendant Wanda Magnuson, the other defendant found guilty of RICO charges, held any interest in the properties.

3. Personal Property, Equipment, and Inventory

The personal property, equipment, and inventory is forfeitable pursuant to either section 1963(a)(1) or (a)(3). Each of these items was identified in the indictment charging the racketeering activity.[2] The evidence presented at trial and in the ensuing forfeiture hearings makes clear these items were acquired or maintained as part of the racketeering activity in violation of section 1962. Much of the property was undoubtedly derived from proceeds of the ongoing enterprise.

More specifically, the personal property, inventory, and office equipment permitted defendant to carry on his racketeering activity. Defendant used the various items of office equipment to facilitate the sale of obscene materials and the conduct of the RICO enterprise. The personal property – including video cassette recorders, projectors, and furniture – located on the premises of the aforementioned real property and business clearly were maintained by, and used in, the continuing racketeering activity. A cursory review of those videos and magazines supplied by the government reveals that defendant acquired and distributed scores of materials which were similar in nature to those declared obscene. The Court has little doubt the inventory of videos and magazines held at the various properties previously determined forfeitable were part and parcel of defendant's racketeering

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[2] The three automobiles were not specifically identified until trial. The indictment, however, provided the government would seek forfeiture of any motor vehicles associated with the racketeering enterprise.

scheme. As such, they are subject to forfeiture as set forth in the indictment and as provided pursuant to sections 1963(a)(1) and (a)(3).

The three motor vehicles – two vans and a trailer – also were maintained by the activities of the RICO enterprise. The evidence demonstrated the vehicles were purchased by the enterprise for use in the distribution of various materials to defendant's business properties. The vehicles were an integral aspect of the racketeering scheme and are, therefore, properly subject to forfeiture under section 1963(a)(1) and (a)(3).

4. Bank Accounts and Proceeds

The government asks the Court to forfeit bank accounts, all funds credited to and traceable from the accounts, and all safe deposit boxes associated with the business entities in which the jury determined defendant had an interest pursuant to section 1962(a)(2). The government also seeks forfeiture of $8,910,548.10 as proceeds of the racketeering activity for the years 1985 through 1988. Both the accounts and the total proceeds were alleged as forfeitable in the indictment.

The broad extent of the government's request in this area of forfeiture poses a serious question of the relationship between the dollars generated in the sale or distribution of the videos and magazines declared obscene, and that portion of defendant's enterprises which were not obscene and were, perforce, not illegal. Plainly, there is

little chance that the sale of these few videos and magazines could generate such massive income to the enterprise.

In reply to these concerns, the government supplied the Court with the aforementioned 400 tapes and magazines. The Court has conducted a general review[3] of these materials. There is little doubt some of it is of the same quality as that declared obscene. At the same time, much of the material is similar to that charged in those counts as to which the jury acquitted the defendants. The proffered evidence, therefore, is of assistance, but is not dispositive of this issue. Certainly interstate trafficking in obscene materials constitutes the RICO predicates here. But the question remains: Is the jury's verdict, finding a small number of materials to be obscene, sufficient to support such a vast forfeiture? The Court holds the forfeiture is supported by law and the facts of this case.

There is no question the proceeds of a racketeering enterprise are forfeitable, pursuant to section 1963. Part (a)(3) specifically contemplates the forfeiture of proceeds, and the term "interest" has long been defined to include proceeds and profits. 18 U.S.C. §1963(a)(3); *Rusello v. United States*, 464 U.S. 16, 22, 104 S.Ct. 296, 300, 78 L.Ed.2d 17 (1983); *United States v. Robilotto*, 828 F.2d 940, 948 (2d Cir. 1987), *cert. denied*, 484 U.S. 1011, 108 S.Ct. 7112, 98 L.Ed.2d 662 (1988). The availability for forfeiture

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[3] The Court reviewed the materials in a less rigorous fashion than is called for in determining "obscenity *vel non*," preliminary to submitting allegedly obscene materials to a jury. The Court has not spent the 450-600 hours which might have been required to view each of the video tapes in its entirety.

of proceeds of the racketeering activity arises out of courts' recognition that RICO forfeiture is an *in personam*, rather than *in rem*, punishment. *Robilotto*, 828 F.2d at 948-49; *United States v. Ginsburg*, 773 F.2d 798, 800 (7th Cir. 1985), *cert.denied*, 475 U.S. 1011, 106 S.Ct. 1186, 89 L.Ed.2d 302 (1986). This *in personam* nature places an emphasis on punishment to the criminal "by separating him from his ill-gotten benefits, rather than [on] confiscating 'guilty' items." *United States v. Vogt*, 713 F.Supp. 847, 860 (M.D.N.C. 1987).

In determining which proceeds are subject to forfeiture, the exact identity of dollars, or the tracing of funds, is not required. *Robilotto*, 828 F.2d at 948; *Ginsburg*, 773 F.2d at 801-803. RICO forfeiture, as an *in personam* penalty, deprives the defendant of all profits and proceeds acquired through the racketeering activity, "regardless of whether those assets are themselves 'tainted' by use in connection with the illicit activity." *Ginsburg*, 773 F.2d at 811; *United States v. Walsh*, 700 F.2d 846, 857 (2d Cir. 1983). As such, it "does not matter whether the government recovers the identical dollars . . . as long as the amount that the defendant acquired in violation of the statute is known." *Ginsburg*, 773 F.2d at 801. To require tracing would "simply provide an incentive for racketeers to engage in complicated financial transactions to hide their spoils." *United States v. Navarro-Ordas*, 770 F.2d 959, 970 (11th Cir. 1985), *cert. denied*, 475 U.S. 1016, 106 S.Ct. 1200, 85 L.Ed.2d 313 (1986); *Vogt*, 713 F.Supp. at 863. the government's ability to seize forfeitable proceeds may not be "abridged by intervening investment of tainted funds in non-enterprise assets." *Vogt*, 713 F.Supp. at 863.

The forfeiture of all proceeds is an appropriate punishment pursuant to the RICO provisions. To "truly separate the racketeer from his dishonest gains, . . . [RICO] requires him to forfeit . . . the total amount of the proceeds of his racketeering activity regardless of whether the specific dollars received form that activity" are those forfeited. *Ginsburg*, 773 F.2d at 802. As such, forfeiture extends to a defendant's "entire interest in the enterprise." *United States v. Busher*, 817 F.2d 1409, 1413 (9th Cir. 1987).

The determination of the amount of profits and proceeds of the racketeering activity cannot be precise. Courts, however, have concluded gross profits are at least one acceptable measure of proceeds. *United States v. Lizza Industries, Inc.*, 775 F.2d 492, 498 (2d Cir. 1985), *cert. denied*, 475 U.S. 1082, 106 S.Ct. 1459, 89 L.Ed.2d 716 (1986). Although this method poses potential difficulties in dividing moneys derived from the enterprise from those obtained independently, this concern alone will not undermine use of the gross profits figure.

> Forfeiture under RICO is a punitive, not a restitutive, measure. Often proof of overhead expenses and the like is subject to bookkeeping conjecture and is therefore speculative. RICO does not require the prosecution to prove or the trial court to resolve complex computations, so as to ensure that a convicted racketeer is not deprived of a single farthing more than his criminal acts produced. RICO's object is to prevent the practice of racketeering, not to make the punishment so slight that the economic risk of being caught is worth the potential gain.

Lizza Industries, Inc., 775 F.2d at 498.

As discussed, the identity of the seized proceeds is not crucial. Rather, the important element is the *amount* received through the pattern of racketeering activity. *United States v. Connor*, 752 F.2d 566, 576 (11th Cir.), *cert. denied sub nom Taylor v. United States*, 474 U.S. 821, 106 S.Ct. 72, 88 L.Ed.2d 59 (1985) (emphasis original). Since the parties have stipulated to a court resolution of this issue, the jury's verdict is only one factor the Court may consider in determining forfeitability. But the Court notes that the appropriate nexus between the proceeds and the illegal activity may be demonstrated by the jury's verdict of guilt, particularly if the proceeds are addressed in the indictment. *Id.* at 577. In addition, the Court may consider all the evidence in the case, even circumstantial evidence, to determine the amount to be forfeited and the connection between the racketeering activities and the proceeds.[4] *Vogt*, 713 F.Supp. at 866-67.

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[4] In many respects, the RICO forfeiture at issue is similar to forfeitures pursuant to 21 U.S.C. §881. Under section 881, if the government is able to demonstrate property is used in any manner to facilitate the sale of narcotics, the property is subject to forfeiture. *One Blue 1977 AMC Jeep v. United States*, 783 F.2d 759, 761 (8th Cir. 1986). Forfeiture is appropriate no matter how small the quantity of drugs, *United States v. One 1980 Red Ferrari*, 875 F.2d 186, 188 (8th Cir. 1989), or how little of the property is used to distribute. *United States v. Tax Lot 1500*, 861 F.2d 232, 235 (9th Cir. 1988), *cert. denied*, ___ U.S. ___, 110 S.Ct. 364, 107 L.Ed.2d 351 (1989); *United States v. Reynolds*, 856 F.2d 675, 676-77 (4th Cir. 1988); *United States v. Certain Real Property in Auburn, Maine*, 711 F.Supp. 660, 663 (D.Me. 1989); *United States v. Twelve Thousand Five Hundred Eighty Five Dollars*, 669 F.Supp. 939, 942 (D.Minn. 1987). While the forfeiture proceeding pursuant to 21 U.S.C. §881 is civil and *in rem*, its wide use and acceptance supports implementation of similar RICO measures.

Large scale forfeiture is entirely consistent with the provisions and purposes of RICO. This Court has previously commented upon the harsh punishment Congress clearly intended to impose under RICO. *Alexander*, mem. op. at 27-29 (D.Minn. January 24, 1990); *Ginsburg*, 773 F.2d at 802. The statute is intended to be given a broad reading and liberal interpretation. *Ginsburg*, 773 F.2d at 802. In keeping with this general approach to implementing RICO, a punishment for a RICO violation should be proportional to the racketeering crime. *Lizza Industries, Inc.*, 775 F.2d at 498; *United States v. Huber*, 603 F.2d 387, 397 (2d Cir. 1979), *cert. denied*, 444 U.S. 927, 100 S.Ct. 1312, 63 L.Ed.2d 759 (1980). A RICO forfeiture penalty "is keyed to the magnitude of a defendant's criminal enterprise." *Lizza Industries, Inc.*, 775 F.2d at 498.

These bank accounts, these traceable funds, and the eight million dollar figure were all contained in the indictment. The proceeds clearly supported the RICO scheme by providing the means and methods of transporting and selling obscene materials. Underlying those materials which the jury found obscene is that vast support system which made their existence and sale in this state possible.

In enacting RICO, and in granting its large penal power, Congress made clear its intent: a RICO enterprise is to be dismantled, root and branch. Mere forfeiture of the dollars obtained from an isolated criminal event would make this goal a mockery. These bank accounts and proceeds financed distribution of obscene materials. The money was acquired by investing in defendant's illegal enterprises. There is no doubt these funds are substantial. Yet, the evidence demonstrates beyond a

reasonable doubt the sum sought to be forfeit is not beyond the scope of the enterprise proven.

Defendant has vigorously and often contended the funds should be protected in light of the first amendment. It is clear that some of the proceeds were obtained in the sale and distribution of protected materials. But the proceeds were inextricably tied to an enormous racketeering enterprise, and their connection to arguably protected speech will not save them from the reach of RICO forfeiture. Given the nexus between the accounts and the proceeds, the Court approves and grants the government's request for forfeiture of these items.

II. Costs of Prosecution

The government seeks reimbursement, in the amount of $29,737.84, for its costs of prosecution. The government suggests $16,536.24 of this amount must be assessed pursuant to the mandatory language of 26 U.S.C. §7206(5). In any case, the government contends the entire amount is recoverable, pursuant to 28 U.S.C. §1918(b) and 1920. Section 1918(b) provides "[w]henever any conviction for any offense not capital is obtained in a district court, the court may order that the defendant pay the costs of prosecution." 28 U.S.C. §1918(b). Section 1920 permits this Court to impose various fees and costs of administration.

The language regarding mandatory imposition of costs, pursuant to 26 U.S.C. §7206(5), is identical to the language of 26 U.S.C. §7203. The Eighth Circuit has specifically held a district court has no discretion in imposing the costs of prosecution pursuant to section 7203. *United States v. Wyman*, 724 F.2d 684, 688 (8th Cir. 1984). The

costs are mandatory. *Id.* The identical language of section 7206(5) mandates a similar holding in this instance. *See United States v. Fowler*, 794 F.2d 1446, 1450 (9th Cir. 1986), *cert. denied*, 479 U.S. 1094, 107 S.Ct. 1309, 94 L.Ed.2d 157 (1987). As such, defendant is ordered to reimburse the costs of prosecution on the tax counts. This sum totals $16,536.24. *See United States v. Palmer*, 809 F.2d 1504, 1506-08 (11th Cir. 1987); *United States v. Snowadzki*, 723 F.2d 1427, 1431 (9th Cir.), *cert. denied*, 469 U.S. 839, 105 S.Ct. 140, 83 L.Ed.2d 80 (1984); *United States v. Troiani*, 595 F.Supp. 186, 187 (N.D.Ill. 1984).

Imposition of costs pursuant to 28 U.S.C. §§1918 and 1920 is entirely within this Court's discretion. *United States v. Hiland*, No. 89-1222, slip op. at 51 (8th Cir. July 19, 1990); *United States v. Burchinal*, 657 F.2d 985, 997-98 (8th Cir.), *cert. denied*, 454 U.S. 1086, 102 S.Ct. 646, 70 L.Ed.2d 622 (1981). the Court, however, may not assess costs associated with those counts upon which defendant was acquitted or counts concerning co-defendants. *Hiland*, slip op. at 51. Costs of prosecution are entirely appropriate in a case involving obscenity charges. *United States v. American Theater Corp.*, 526 F.2d 48, 50-51 (8th Cir. 1975), *cert. denied*, 430 U.S. 938, 97 S.Ct. 1569, 51 L.Ed.2d 786 (1977).

The Court concludes costs of prosecution should be assessed for this entire prosecution. The scope of defendant's criminal involvement, particularly the tax conspiracy and racketeering activities, required extensive investigation and preparation on the part of the government. Given the dollar figures associated with defendant's tax and RICO crimes, justice will be served by requiring defendant, rather than the taxpayers at large, to

pay for the costs of prosecution. Defendant created his criminal empire and now must pay for its destruction. The $29,737.84 cost of prosecution is, therefore, recoverable pursuant to 28 U.S.C. §§1918 and 1920.

Accordingly, IT IS ORDERED that:

1. Defendant hereby forfeits the property and proceeds considered in this order and specifically delineated in this Court's accompanying forfeiture order and judgment, dated August 6, 1990.

2. Defendant shall pay to the United States the sum of $29,737.84 as the costs of prosecution.

Dated: August 10, 1990

/s/ James M. Rosenbaum
JAMES M. ROSENBAUM
United States District Judge

APPENDIX E

Excerpts From Transcript Of Oral Argument In *Alexander v. United States*, 509 U.S. 544 (1993).

* * *

[p. 98] [ARGUMENT OF PETITIONER]

QUESTION: Mr. Weston, can I ask you a question about your theory? I understand what you're saying about speech both causing it and being what's forfeited.

What if what was forfeited was – say American Airlines showed a couple of obscene movies on a flight. Would you say that that would justify forfeiture of the whole airline?

MR. WESTON: No, Justice Stevens.

QUESTION: But under the statute would it? I'm curious about how the statute operates. Here his entire business was forfeited because a half a dozen or so obscene items were seized. Would the statute operate in the same way in my hypothetical?

MR. WESTON: Absolutely. For two or more –

QUESTION: But you're saying that would not violate any – that would be perfectly constitutional to take over the airline –

MR. WESTON: No, we're not –

QUESTION: – because they're not engaged in the speech business.

MR. WESTON: No, Your Honor, we're not saying [p. 99] that, and for two reasons. One, because it may well be – and I would assume in the circumstance that

you suggested – that taking over the entirety of the airline would certainly affect a prior restraint on the airline's ability to be able to exhibit other unlitigated motion picture films. But in this context –

QUESTION: It's only for that reason, not because of the magnitude of the seizure. You don't rely at all on the magnitude of what –

MR. WESTON: Not the –

QUESTION: – was seized in relation to the –

MR. WESTON: Not from the –

QUESTION: – small amount of what was –

MR. WESTON: Excuse me.

QUESTION: – the violation.

MR. WESTON: Not from the First Amendment perspective. Of course, the Eighth Amendment might well speak to that, as we have raised in our –

QUESTION: Mr. Weston, I take it you don't claim that the RICO statute did not authorize these seizures.

MR. WESTON: Not only did it not – not only do we not claim that, Justice White, we affirmatively represent and argue that this judgment fairly and accurately did exactly what the RICO statute directed trial judges to do under the circumstance.

[p. 100] QUESTION: So, you think the provision of – you don't think you can find any basis for objecting to this forfeiture in the provisions of the statute authorizing the forfeiture.

MR. WESTON: That is –

QUESTION: You don't think that this forfeiture that the Government insisted on was outside the provisions of the statute.

MR. WESTON: Given –

QUESTION: I mean, just as a statutory construction problem.

MR. WESTON: Given the broad potential for forfeiture under 19 – section 1963, what the Court did was commanded and directed by the statute. Trial counsel ably argued that the forfeiture should be limited to the obscene materials and the proceeds specifically attributable, and under the grandiloquent phrase from Congress and from judicial decisions that the purpose of RICO is to extirpate the entire business root and branch –

QUESTION: But it's the entire business – any contribution of the business, no matter how trivial, is the proceeds of a predicate offense?

MR. WESTON: Under settled – under existing law that appears to be unquestioned as Judge Kozinski in the [p. 101] Ninth Circuit in U.S. v. Busher railed against in that case.

I would just like to conclude, if I may, Justice Stevens, with the second portion of the question that you had asked and that was this, that in the circumstance where the entirety of American Airlines might be seized because of the two or three films.

Under that circumstance, we would suggest that one would look to the motive underlying the statute in terms

of its speech suppressive characteristics that the statute had been, whether it be, in that circumstance, to get at speech or more specifically in our own client's situation where it had been devised to get to speech. We would suggest that the motive ought to be examined even though we well recognize –

QUESTION: Now, is that as a constitutional matter or as a statutory matter?

MR. WESTON: As a constitutional matter –

QUESTION: No.

MR. WESTON: – in terms of dealing with –

QUESTION: But under the statute, there – the prosecutor would have the same duty to seize the entire airline that he has here and seize the entire business.

MR. WESTON: Absolutely, Justice Stevens. No question.

* * *

[p. 109] [ARGUMENT OF SOLICITOR GENERAL STARR]

QUESTION: But is that – tell me this because I really am curious because the statute is a difficult statute to understand. Do you agree with your opponent with respect to his answer to my hypothetical about American Airlines, that you would have the authority under the statute to forfeit the entire airline if they showed three of four obscene movies in a flight from here to California?

MR. STARR: Absolutely not. Under – and the reason is the statute, 1962, talks about a pattern of racketeering. This Court in HJ, Inc., this Court in Sedima –

QUESTION: Well, but you had a pattern of racketeering with six obscenity offenses. That's enough isn't it?

MR. STARR: But we were –

QUESTION: Under the statute I mean.

MR. STARR: But we were prepared to show much more –

QUESTION: No. I know you could have proved a [p. 110] lot more, but is it not true that under the statute, all you had to prove was six obscenity offenses to get your pattern of racketeering –

MR. STARR: To show that, in fact, there was a pattern of racketeering, and then the other elements of the enterprise, that the enterprise was used in the offense. That is to say, to take your American Airlines –

QUESTION: Right.

MR. STARR: If a division manager or if the president himself of American Airlines, if Mr. Crandall orders the showing of this, it doesn't mean American Airlines is going to be forfeited. He may – it is in personam. This operates in personam. If it's corporate policy, yes. I would have to say, Justice Stevens, that there is the possibility that we would have to analyze the corporation's liability. But recall –

QUESTION: Well, it helped sell a few tickets to the – from here to California. Isn't that enough? Isn't that all you need under the statute?

MR. STARR: Not at all in terms of corporate – I'm trying to draw a distinction between what I understand you to be concerned about, which is forfeiture by American –

QUESTION: I'm concerned about the [p. 111] disproportionately problem –

MR. STARR: Exactly, forfeiture of an entire airline on the basis of these few offenses. My response –

QUESTION: Each of which contributed to the running of the business because it induced some people to take the flight that they might not otherwise have taken.

MR. STARR: I would have to know, first of all, whether this was, in fact, corporate policy, board of directors approved policy, and the like when we're talking about a corporate forfeiture as opposed to the in personam forfeiture of Mr. Crandall's own interest in American Airlines because he has to, under the statute, use this enterprise for criminal purposes. That's the evil that the statute is getting at, and that's what was built up here.

QUESTION: Well, let's assume the board of directors approved the schedule of the flight, you know, what – the movies they're going to show on the flight to California. It's rather unlikely, but assume they did. And they decided that there were six very interesting Swedish films that –

(Laughter.)

QUESTION: – might be very attractive to a lot of travelers, and they decided to show them. They turn [p. 112] out to be obscene, and they had advertised them. They could forfeit the whole airline.

MR. STARR: I don't think so under this Court's interpretation in HJ, Inc. of the statute, which we don't quarrel with. In fact, we think it's quite correct because it is the statute's concern, Congress' concern, about what the Court called the pattern, that is to say, a threat of continuity. This is –

QUESTION: But you just told me six is enough for a pattern.

MR. STARR: I have suggested that it could be enough as long as there is the threat of continuity, and that is why I will not concede that any, other than the most irrational, corporation would knowingly, as a matter of corporate policy, continue and threaten to continue within the meaning of HJ, Inc.

What this statute was aiming at and why this court has seen since 1984 so little of these kinds of predicate offenses is the kind of empire that we saw here, one that is essentially given over to the display of materials that are very similar, as the district court saw, to those –

QUESTION: Well, it may be – Mr. Starr, if I may interrupt you. It may be very similar, but there is a crucial constitutional difference depending on whether [p.113] there are six pieces which are obscene and 600,000 which are merely erotic. And it seems to me that your argument rests upon the identification of what is assumed and probably correctly assumed to be simply erotic adult

material with the six which were shown to be obscene. And that's your way of sort of getting out of the analogy that Justice Stevens is suggesting, and I don't see how that's a legitimate basis. I don't see how we can assume the identity of eroticism with obscenity.

MR. STARR: I don't think you have to make that assumption. The point that I am getting at is can Congress constitutionally say once you prove the requisite elements of RICO, effect a forfeiture. In our view, yes, that it is not disproportionate when, in fact, the enterprise is being used as the instrument for carrying out the criminal activity. Here the pattern is the sale of obscene materials.

QUESTION: And, General Starr, would you take the same position if a substantial amount of the inventory turned out to be Gideon's Bibles?

MR. STARR: We would take the same position, that it is – that what RICO is getting at – and I think this is what is critical in terms of First Amendment analysis, that RICO is neutral in terms of what it is seeking to obtain. It is seeking to obtain proceeds and assets. It does not care what those assets are, if their cash registers or if they're Gideon's Bibles.

* * *